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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

YOLANDA GOMEZ, et al., Petitioners

v.

THE HOUSING AUTHORITY OF THE CITY OF EL PASO, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

JUSTO FERNANDEZ-GONZALEZ
Counsel of Record

EPLAS
1220 N. STANTON
EL PASO, TEXAS 79902
(915) 544-3022
Counsel for Petitioners

October 1993

132 pp

QUESTION PRESENTED

Whether a municipality can be held liable under §1983 for misconduct of non-policy making employees, who acting pursuant to official policy, denied Petitioners the right to submit an application and a federal preference for public housing without a hearing in violation of federal statutes and of the Due Process Clause under the Fourteenth Amendment of the United States Constitution.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representation are made in order that the Judges of this Court may evaluate possible disqualifications or refusal.

Yolanda Gomez
Manuel Gomez
Maria Valadez-Gonzalez
Gerardo Velasquez
Isabel Velasquez

Board of Commissioners of the Housing Authority of the City of El Paso:

Rodolfo Hernandez, present board member
Blanche Darley, present board member
Margarito Rodriguez, present board member
Jose F. Cardenas, present board member
Pete Payan, present board member
Ellie Fenton, past board member
Rene Pena, past board member

Edmund Carrera, past Executive Director, Housing Authority of the City of El Paso

Roberto Alvarado, present Executive Director, Housing Authority of the City of El Paso

Michael C. Crowley, trial and appellate attorney for Petitioner-Appellees

Edward W. Dunbar, appellate attorney for Respondents-Appellees

Justo Fernandez-Gonzalez, trial and appellate attorney for Petitioner-Appellants

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Justo Fernandez-Gonzalez
Attorney of Record for
Petitioners-Appellants

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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_____

Yolanda Gomez, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, 1a - 3a) is unreported. The opinions of the District Court (App.,

infra, 4a - 20a) is reported at 805 F. Supp. 1363 (W.D. 1992).

JURISDICTION

The court of Appeals entered its judgment on April 4, 1994 (App., infra, 1a - 3a). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

24 C.F.R. §960.211(k) provides in relevant part, that "[n]otice and opportunity for a meeting where a federal preference is denied. If the PHA determines that an applicant does not meet the criteria for receiving a federal preference . . . the notice must . . . state that the applicant has the right to meet with the PHA's designee to review it.

STATEMENT

Three families in El Paso Texas sued the El Paso Housing Authority in January 1991 in the Federal District Court for the

Western District of Texas. They alleged that the Housing Authority of El Paso failed to provide plaintiffs the notice and opportunity for a meeting required, wherein a federal preference is denied in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and 24 C.F.R. §960.211(k). The families were complaining that the Housing Authority did not allow applicants the opportunity to be heard whenever they attempted to submit an application for the waiting list. The District Court denied the Petitioners relief for declaratory and injunctive relief. The Court of Appeals for the Fifth Circuit affirmed the District Court's decision. The Court of Appeals, however, suggested that the Housing Authority "adopt and implement better grievance procedure and written promulgating thereof . . ." the Court of

Appeals decision to suggest rather than to mandate is contrary to 24 C.F.R. §960.211(k).

A. Housing and Urban Development and the requirement of Due Process.

The Housing Authority of the City of El Paso is an agency that receives federal funds from the Department of Housing and Urban Development ("HUD"). They enter into the Annual Contribution contract ("ACC") every year. The Housing Authority is required, under the ACC, to comply with the regulations enacted by HUD. The HUD regulations require the Housing Authority to adopt and implement policies. . . which are specific and describe in detail the criteria, standards and preferences to be applied! 24 C.F.R. §960.204(a), (d)(3)(1992).

To assure that PHA provided due process to applicants for public housing,

HUD enacted a regulation that specifically requires PHA to establish procedural safeguards. 24 C.F.R. §960.211(k) states as follows:

> "Notice and opportunity for a meeting where federal preference is denied. If the PHA determines that an applicant does not meet the criteria for receiving a federal preference. . . . the notice must . . . state that the applicant has the right to meet with the PHA's designee to review it."

The PHA's position is that the Admissions and occupancy policy that's being challenged has been implemented strictly in conformance with the C.F.R.'s. When one examines the policy, however, it is clear that PHA is not in conformance with the C.F.R.'s. The PHA policy states that "applicants are notified in writing, of determinations of ineligibility and denials of federal preferences, as soon as the reasons for determination becomes apparent.

Clearly, the admissions policy is in non-compliance with the procedural requirements of the regulation in that the policy fails to specify when the applicant is entitled to a notice and opportunity for a meeting to contest the denial of a Federal Preference. The regulation requires PHA to make a determination whether an applicant has a federal preference at the time they are seeking housing assistance. 24 C.F.R. §960.204(a), (b)(4)(1992).

Thus, the PHA's admissions policy is deficient and not in compliance with the C.F.R.'s in two respects. (1) Applicants who state a federal preference at the time that they seek public housing, and are denied an application, do not have either a pre-deprivation meeting to determine whether their denial was appropriate and in compliance with the regulations. The

second issue of non-compliance with the regulation is that only applicants who are allowed to apply for public housing, are provided with notice of their denial of a federal preference and informed of their right to a meeting to contest the denial. This process could take several years PHA allows all applicants to apply for housing when the waiting list is open regardless of whether someone qualifies for a federal preference or not. The acceptance of applications is closed as soon as PHA accepts enough applications. This process is contrary to regulation because those who truly have a federal preference are excluded from applying without a hearing, if the waiting list has been closed because they accepted ineligible applicants. Moreover, even when the waiting list is open, they may still not be allowed to apply based on the employees

interpretation of the admissions policy.

The District Court and the court of Appeals failed to properly analyze the claim within the context of the failure of the Housing Authority's Board to adopt and promulgate admissions policy in conformity with the federal statutes and how the Housing Authority policy-making officials misconduct was directly related to the Employees interpretation of a policy which delegated broad authority to interpret the C.F.R.'s in question. It is clear that HUD, by enacting the regulation, intended to provide a guarantee that procedural rights were protected by the Housing Authority by demanding that notice of denial and the opportunity for a meeting be provided to applicants who are denied a preference at the time that they are seeking public housing. The regulation makes it mandatory on the PHA's to

establish procedural safeguards. The Court of Appeals however, erred when it merely suggested to the PHA to enact and promulgate grievance procedures. The Court of Appeals rendered more of an advisory opinion and failed to resolve an issue in controversy.

Thus, the question presented here is whether the Court of Appeals erred in not recognizing that where the Housing Authority has enacted a constitutionally infirm policy that deprives Petitioners of their protected property right and where the employees misconduct caused deprivation of the Petitioners rights rises to the level of constitutional tort under §1983. The Housing Authority failed to follow the Federal regulation; the regulation made it mandatory on the PHA to establish procedural safeguard and its failure to adopt said procedures resulted

in the deprivation of the Petitioners protected property interest in violation of the applicants' Due Process Right Guaranteed by the Fourteenth Amendment of the United States Constitution.

B. Proceeding below

Petitioner filed a class action lawsuit on January 24, 1991 against the El Paso Housing Authority alleging, inter alia, that Respondents failed to provide Petitioners the notice and opportunity for a meeting required, wherein a federal preference is denied in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and 24 C.F.R. §960.211(k).

A motion to certified the class was denied; a jury request was denied as well. A bench trial was held before the District Court Judge Sam Sparks. The District court denied Petitioners Injunctive and

declaratory relief.

The District Court ruled that since the violations were not committed by Policy-makers or under any authority, the Housing Authority could not be held liable under 42 U.S.C. §1983. The Court found that in order to find EPHA liable, Petitioners must show . . . that there existed a policy or custom by EPHA which violated HUD regulations regarding admissions and federal selection preferences. Petitioners appealed the judgment of the District Court to the Court of Appeals for the Fifth Circuit.

The Petitioners alleged in their appeal that the Housing Authority was liable under §1983 for the misconduct of non-policy makers because the admissions policy was not specific and delegated broad authority to employees to deny an applicant the opportunity to submit an

application for housing and to qualify for a preference without a predeprivation or postdeprivation hearing.

The Court of Appeals granted oral argument in this case. Petitioners argued the case on February 28, 1994; A per curiam decision was rendered by the Court on April 4, 1994 affirming the District Judgment, and stating that "[a]lthough there is evidence that housing officials treatment of the Plaintiffs was to varying degrees, negligent and even abusive, in no instance did such mistreatment rise to the level of Constitutional tort cognizable under §1983." The Court, however, suggested "that the Housing Authority adopt and implement better grievance procedures and written promulgation thereof. . ."

REASONS FOR GRANTING PETITION

This case presents the opportunity to

provide guidance to lower court as to whether a municipality can be held liable under §1983 for misconduct of non policy-making employees, who acting pursuant to the Agency's policy, deprive petitioners of their right to notice and an opportunity for a meeting to review denial of public housing as required by 24 C.F.R. §960.211(k) and in violation of the Due Process Clause of the United States Constitution.

I. By affirming the District Court's decision that the municipality could not be held liable under §1983 for misconduct of non-policy makers employees, the Court of Appeals committed error because where the municipal employees are acting pursuant to agency policy and said policy is not in compliance with the requirements of a federal regulation and in violation of Procedural Due Process, liability against the municipality has been established under 42 U.S.C. §1983.

The lower Courts are under the impression that a municipality could not be held liable under §1983 for misconduct

of non-policy making employees. The argument is based on the misinterpretation of Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018(1978) and City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915(1988).

In Monell, supra the Court recognized municipal liability where the "[b]oard and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons." Monell, supra, 436 U.S. 661. "Local governing bodies, therefore, can be sued directly under §1983 for monetary declaratory or injunctive relief. Whereas, here, the action alleged to be unconstitutional implements or executes a policy statement . . . officially adopted and promulgated by the body's officers.

Similarly, in City of St. Louis v. Praprotnik, supra the Court held that "[T]he city cannot be held liable under §1983 unless respondent proved the existence of an unconstitutional municipal policy. Respondent does not contend that anyone in city government ever promulgated or even articulated such policy." Praprotnik, supra, 485 U.S. 128. In subsequent cases, this Court provided clarification and "rejected the city's argument that only unconstitutional policies can create municipal liability under the statute." Collins v. Harker Heights, 503 U.S._____, 117 L.Ed 2d 261, 273 (1992).

The question of municipal liability is not whether policy-makers were directly involved in the constitutional tort , but whether if a city employee violates another's constitutional rights, the city

may be liable if it had a policy or custom of failing to train its employees and that failure to train caused the constitutional violation. In particular, we held that the inadequate training of police officers could be characterized as the cause of constitutional tort . . ." Id p.272. The issue, therefore, is for purposes of establishing liability under whether §1983, "the municipality caused the constitutional violation."

Both Monell, supra, and City of Canton v. Harris, 489 U.S. 378, 103 L.E 2d 412 109 S.Ct. 1197(1989) expressly recognized the importance of establishing the causal link between the agency's policy and the constitutional deprivation. ". . . in any case alleging municipal liability under §1983 the question is whether there is causal link between a municipal policy or custom and the alleged

constitutional deprivation." Id. at 385.

The Court erred in its analysis of what is necessary to establish municipal liability for actions of non-policy makers that caused a deprivation of Petitioners' Constitutional Rights. This Court, through this case, can provide guidance to the lower courts as to whether a municipality is liable under §1983 when its employees, non-policy makers, acting under an official policy that does not provide for a notice and an opportunity to be heard in the denial of an application and federal preference for public housing contrary to 24 C.F.R. §960.211(k) and in violation of Procedural Due Process under the 14th Amendment of the Constitution.

II. The Decision of the Court of Appeals is erroneous.

The lower Court erroneously decided

that "The Housing officials treatment of the plaintiffs, was to varying degree, negligent or even abusive, in no instance did such mistreatment rise to the level of a constitutional tort cognizable under §1983." The Court erred in suggesting to the Housing Authority to adopt and implement better grievance procedures..."

The Court failed to show a reasoned analysis of the Petitioners' issue raised on appeal. The issue before the Court of Appeals was whether the Housing Authority is liable under §1983 to appellants for the misconduct of non-policy makers because the admission policy was not specific and delegated broad authority to employees to deny applicants the opportunity to submit an application for housing and to qualify for a preference without a predeprivation or post deprivation hearing. " . . . proper

analysis requires us to separate two different issues where §1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation and (2) if so, whether the city is responsible for that violation." Collins v. Harker Heights, Id. p 270.

Thus, the question before the Court of Appeals was to determine whether Petitioners had presented a violation of a right, under the Due Process Clause of the Fourteenth Amendment, to be provided with a notice and an opportunity to be heard in a denial of an application and a federal preference for public housing applicants pursuant to 24 C.F.R. §960.211(k).

The Court recognized that federal regulations require that each public housing authority adopt and implement policies and procedures which give

preferences to applicants who are otherwise eligible for assistance and who, a the time they are seeking housing are (1) involuntarily displaced, (2) living in substandard housing, or (3) paying more than 50 percent of family income for rent." Gomez v. Housing Authority of the City of El Paso, 805 F. Supp. 1363 (W.D. 1992). The regulation, 24 C.F.R. §960.211K specifically require the Housing Authority to provide applicants with notice of right to a hearing upon denial of federal preference. "If PHA determines that an applicant does not meet the criteria for receiving a federal preference . . . the notice must . . . state that the applicant has the right to meet with the PHA's designee to review it".

The PHA admissions policy does not provide applicants with any notice and the

opportunity to be heard to applicants who are denied an application and a federal preference at the time that they are seeking housing. Notice of right to a meeting to contest the denial is granted to those applicants who were permitted to submit an application for public housing and were subsequently denied a federal preference. Thus, an applicant, who has been denied an application for public housing can never be entitled to any hearing pursuant to the policy and practice of the Housing Authority. Thus, applicants who attempt to apply for housing are deprived of their constitutional right to a hearing or meeting to contest the denial of an application and a federal preference.

Ms. Pat Michael's, the Admissions officer for the PHA, was asked by Mr. Fernandez-Gonzalez whether a determination

of a federal preference had to be made at time applicant is seeking public housing and she responded that they do not provide any notice and opportunity to be heard at the initial level; hearings are provided for those who applied and are deemed ineligible. For instance, in the case at hand, the Court found that "a family considered to be elderly must be given a preference for admissions to projects for elderly family. However, Petitioners were not allowed to apply and no notice of hearing was provided by PHA employees. 24 C.F.R. §960.406(a).

The Housing Authority's policy in admissions is not specific as to where, who and where are applicants entitled to notice and an opportunity to be heard. It states, "applicants are notified, in writing . . . of a federal preference . . . as soon as the determination becomes

apparent." Ms. Pat Michaels stated that in practice only individuals who were allowed to apply for housing are provided with notice of their right to a meeting whenever there is determination of a federal preference. She stated that one who is seeking public housing and is denied a federal preference is never provided with a predeprivation or post deprivation hearing. Thus, the absence of procedures in the admissions policy of the Housing Authority has deprived petitioners of their constitutional protected right of property.

Petitioners have an enforceable right under Section 1983 because Congress "[created] privately enforceable rights." Gomez, supra, 1368. See, Wright v. Roanoke Redevelopment and Housing, 479 U.S. 418, 432, 107 S.Ct. 766, 93 L.Ed 2d 781 (1987).

This Court consistently has held since Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972), that an individual has a protected property interest if "[he] must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it. Id. at 577. "It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." Id. p. 577.

The filing of an application

The process of filing an application for public housing creates a legitimate expectation for admission to public housing. Once someone is allowed to submit an application the person will obtain a housing unit unless the person does something to render the family ineligible, such as income or family

composition.

Under Wright v. Roanoke Redevelopment and Housing Authority, supra and Ressler v. Pierce, 692 F 2d 1212, 1214 (9th Cir. 1982), Section 8 housing applicants were entitled to a hearing under the Due Process Clause of the Fourteenth Amendment. Moreover, the Petitioners have claimed a property interest in the entitlements conferred by the Housing Act of 1937, 42 U.S.C. §1437, the regulation, 24 C.F.R. §960.211 and under the "ACC" as 3rd party beneficiaries. See, also, Logan v. Zimmerman, 455 U.S. 422, 432, 71 L.Ed 2d 265, 102 S.Ct. 1148(1982) where the Court stated that:

> "Each of our due process cases has recognized either explicitly or implicitly, that because "minimum (procedural) requirements (are) a matter of federal law, they are not diminished by the fact that the state may have specified its own procedure that it may deem adequate for determining the preconditions to

adverse official action. Id. at 432.

Consequently, the court erred in not addressing the issue of whether the Petitioners had alleged a violation of a constitutional right by the Housing Authority to wit: whether a pre deprivation or post deprivation hearing was required for applicants when they were denied an application and federal preference for public housing.

"We have held, of course, that the Due Process Clause protects interests other than the interest in freedom from physical restraint . . . interest . . . protect[ed] by common law of torts . . . are protected by the Due Process clause. Even so our precedents make clear that a state actor's random and unauthorized deprivation of that interest cannot be challenged under 42 U.S.C. §1983 so long as the state provides an adequate

postdeprivation remedy." Albright v. Oliver, 62 LW4083 (J. Kennedy concurring) Parratt v. Taylor, 451 U.S. 527, 535-544 (1981); See Hudson v. Palmer, 468 U.S. 517, 531 - 536(1984); Ingraham v. Wright, 430 U.S. 651, 674, 682 (1977).

Although the Court of Appeals, and the District Court did not state whether Parratt/Hudson, supra, applied to Petitioners' case, it is clear that it does not. In a Parratt/Hudson situation the conduct by a state actor is random and unauthorized and not pursuant to state procedure or governmental policy. Moreover, state law, in a Parrat situation, provides for a postdeprivation remedy. ". . . where an injury has been caused not by a state law, policy or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for

intervention under §1983 at least in a suit based on "the Process Clause of the Fourteenth Amendment simpliciter." Albright, supra 62 LW 4083.

The Housing Authority enacted an admission policy pursuant to the Annual Contribution Contract and HUD regulations. The Admissions policy, however, is deficient in that it does not specify when an applicant for public housing, who is denied a federal preference and the right to submit an application, is entitled to notice and an opportunity to have a meeting to review the employees denial. Employees who deny applicants a federal preference and an application for housing are not acting in a randomly manner. They are consistent and predictable in denying a federal preferences to applicants at the time that the person is seeking assistance for public housing. The Housing Authority

admitted that it is the policy of the Housing Authority not to make a determination of a federal preference at the time that the applicant is seeking public housing.

Moreover, they never provide a person who has been denied a federal preference at seeking assistance in public housing with a notice informing applicants that they have a right to a meeting.

Furthermore, the actions by the PHA employees is clearly not unauthorized since they are acting pursuant to a deficient policy that does not provide for a either a predeprivation nor a postdeprivation hearing. Respondents do not provide any notice of the right to an appeal to those applicants who have been denied a preference and an application. In oral argument, respondent argued that the petitioners could have asked for a

hearing; however, respondent admitted that the applicant is not provided with any notice which states that they have the right to a meeting to review the denial of their preference. Moreover, Petitioners did not have a post deprivation State remedy available to provide them with an equivalent compensation. "The deprivation was complete and the Due Process Clause has been violated, when the loss of [property] occurs." Collins, supra, at 4092.

In the case at hand, the Velasquez', a disabled person suffering from Epilepsia, and his wife, contacted the Housing Authority to inquire as to whether they had any apartment units available for a couple with an infant under five years of age. The PHA employee informed them that they did have units available and asked them to come to the central office

and submit an application; they did. However, when they filled out the application, another employee of the Housing Authority refused to accept the application and informed them that they did not qualify for a one-bedroom apartment. The employee simply retrieved the application from Petitioners, tore it and threw it in the trash can. The employee did not inform them that they were entitled to a meeting to contest her decision. The employee was not acting in a random and unauthorized manner. The Admissions officer, Ms. Pat Michael, admitted that no one was given a hearing at this stage of the application process. Only those who were allowed to apply, whether or not they stated a federal preference, were informed of their right to contest their decision not to grant them a federal preference.

The Housing Authority's denial of an application was inappropriate and not in conformity with the requirements of Due Process Clause and the federal regulation; petitioners qualified for elderly housing because he was disabled; they also qualified for a preference because they lived in substandard housing: A trailer with no running water, no electricity, heating or air conditioner and very dilapidated; the employee, acting pursuant to the policy, did not take the application, denied them a preference and did not specify if Petitioners could contest her decision.

Thus, clearly Parrat/Hudson does not apply. "If one views [this case] as one of procedural due process, Parrat is also inapplicable, because its rationale does not apply to officially authorized deprivation of liberty or property."

Albright v. Oliver, 62 LW4092 (J. Stevens dissenting). Moreover, Parrat, supra, in inapplicable in that in Parrat, a prison guard negligently deprived an inmate of a hobby set worth $23.50

In the case at bar, the situation is more analogous to Logan v. Zimmerman, 455 U.S. 422 (1982) in that petitioners are claiming their deprivation of a federal preference and an application to public housing effected by non-policy making employees, acting pursuant to the established official admissions policy and procedures which failed to provide a hearing. A meeting was practicable and constitutionally required.

Although Petitioners have shown that they were entitled to a notice of right to a meeting to review their denial of a federal preference pursuant to 24 C.F.R. §960.211(k) and under the Due Process

Clause of the 14th Amendment, the Courts have held that a right to a hearing is not absolute: The Courts have applied a Cost-Benefit Analysis in these type of cases.

Thus, one has to apply a balancing test under Mathews v. Eldridge, 424 U.S. 319, 355, 47 L Ed 2d 18, 96 S.Ct. 893, (1976). Under Mathews, supra, one must examine:

> "[f]irst the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards and finally, the government interest including the function involved in the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

First, the private interest that will be affected by the official action. The Petitioners' health suffered because they live in substandard housing, under very deplorable conditions. Thus, there is a

very strong private interest in obtaining safe, decent and sanitary housing as mandated by the Housing Act of 1937.

Second, the risk of an erroneous deprivation of such interest though the procedures used and the probable value, if any, of additional or Substitute Procedural Safeguards. The regulation, 24 C.F.R. §960.211(k) requires notice that the applicant has the right to a meeting to contest the denial of federal preference. Thus, the fact, that the Housing Authority has a policy that is not very specific and allows broad discretion to employees to determine on a case by case basis to determine who is entitled to a federal preference and an application for housing clearly has resulted in the erroneous deprivation of the Petitioners' property rights such as the case at hand. If one requires PHA to establish more

specific admissions policy and demanding that a notice and hearing be provided after an applicant has been denied a preference, will definitely diminish the risk of erroneous deprivation of Petitioners' property interest.

Finally, the governments interest including the function involved, the fiscal and administrative burdens that the additional or substitute procedure requirement entail would be minimal. At trial, Ms. Pat Michael, the Admissions Officer for the PHA, admitted that there is no right to an appeal to the Board of Directors and that no one has ever requested a hearing at the time that they are seeking housing and where a federal preference is denied. Thus, the administrative burden would be insignificant because notice of right to meet and contest denial would be limited

to those individuals who have stated a federal preference and the waiting list for certain bedroom size is open. Moreover, if PHA did not accept applications from those who do not have a federal preference when the waiting list opens, more persons with a preference would be allowed to apply for housing, however, contrary to the requirements of the regulations, PHA refuses to screen applicants for federal preferences at initial stage.

Thus, accepting applications from those who have a federal preference would significantly reduce the number of eligibility determination hearings because presently, the way that the system is established allows non-eligible applicants to apply for housing and PHA conducts a review for a determination of a federal preference at the verification review;

huge waste! This process is not in compliance with the regulation which requires a determination of a federal preference at the time that the applicant is seeking housing.

The Court of Appeals failed to conduct an analysis of this case under the Cost benefit analysis under Mathews; it failed to apply a balancing test that when applied to this it is tilted in favor of the Petitioners. Moreover, Mathews, supra, applies to pre-deprivation cases. The Housing Authority has failed to provide a hearing before and after deprivation; said policies although, enforced and executed by the employees, are constitutionally infirm. The Housing Authority's adoption of constitutionally infirm admissions policy is the direct cause for the deprivation of Petitioners' right to submit an application for public

housing and for the denial of a federal preference.

Thus, the Court of Appeals' decision is erroneous in that it failed to conduct a proper analysis as to "whether plaintiff's harm was caused by a constitutional violation." Collins, supra, 117 L Ed 2d 261, 270.

Secondly, the Court of Appeals decision is erroneous in that it failed to conduct an analysis as to "whether the city is responsible for the violation." Id. p.270

The Court erred in finding that the municipality could not be held liable for misconduct of non-policy makers "unless authorized, policy maker approves the subordinates decision and the basis for the decision, which ratification would cause Housing Authority to be liable for the decision." Gomez, supra.

The issue was not whether PHA employees were engaging in acts of misconduct that violated the Petitioners' Due Process Rights under the Fourteenth Amendment; Petitioners complaint specifically alleged that the PHA and its Board of Directors "failed to provide plaintiffs the notice and opportunity for a meeting required, wherein a federal preference is denied in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and 24 C.F.R. section 920.211(k). Petitioners challenged the process of Admission and Selection of tenants that the Housing Authority had established as its official admissions policy.

The infirmities of the Admissions process is the issue. The Board of Directors in enacting and adopting a

policy that is constitutionally deficient and contrary to the requirements of HUD regulation are the direct cause of the Petitioners inability to obtain housing. The employees were merely executing and acting pursuant to a policy that did not specify in detail the process owed to Petitioners when they were denied an application.

The United States Supreme Court since Monell, supra, has consistently held that where the municipality caused the constitutional deprivation, they can be held liable to the petitioners under §1983.

> "Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggest that Congress did not intend §1983 liability to attach where such causation was absent." Monell v. New York City Dept. of Social Services, 436 U.S. 658, 56 L Ed 2d 611, 98 S.Ct. 2018 (1978)

Thus, Congress intended to hold municipalities liable for their failure to act according to their obligations and if said failure to act according to their official duties and obligations causes the deprivation of a constitutionally protected right, then liability can be asserted under §1983.

This principal was reiterated in City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197(1989) where the Court Stated:

> "We hold today that the inadequacy of police training may serve as a basis for §1983 liability only where the failure amounts to deliberate indifference to the rights for persons with whom the police came in contact." Id. 489 U.S. at 388.

The Constitutional violation in Canton, supra, was "the right under the Due Process Clause of the Fourteenth Amendment to receive necessary medical attention while in police custody." Collins, supra, at p. 271. The "failure

to train caused the constitutional violation." Id. Thus, the causative link has been established when the municipal employees deprived someone of their constitutional right and the deprivation of a protected right is directly related to the Municipalities' failure to do what it was obligated to do under the law.

Similarly, the Supreme Court recognized municipal liability where "the statutory procedures provides employees with broadly delegated, and uncircumscribed power that causes the deprivation at hand by failing to provide the constitutionally required procedural safeguards to a person they deprive of liberty, the state official cannot escape liability." Zinermon v. Burch, 494 U.S. 113, 135, 110 S.Ct. 975 (1990).

The failure to provide the constitutional protection required by law

will result in liability against the Municipality under §1983. Thus, for instance, in the case at hand, where the admissions policy fails to comply with the regulation and it does not state specifically in detail when who and where someone is entitled to a hearing, then when an employee, a non-policy maker, with broad authority and discretion to implement the infirm admission and selection of tenants policy, deprives Petitioners of their right to obtain decent, safe and sanitary housing as required by the Housing Act of 1937 will result in liability against the PHA. For instance, Pat Michaels had uncircumscribed authority to deny hearings.

The Circuit Courts have followed the Zinermon's supra, approach. In Easter House v. Felder, 910 F 2d 1387 (7th Cir. 1990), the Court found that one "focuses

on the extent to which the state official is uncircumscribed." Id. p. 1400.

Also, in Ezckwo v. New York Health and Hospital Corporations, 940 F. 2d 775, (2nd Cir. 1991) the court found liability against the municipality where "these officials were responsible for all aspects of the residency program and their discretion was essentially unrestricted." Id. 784. In Fields v. Durhan, 909 F. 2d 94, (4th Cir. 1990), the Court did not find liability because "the state established specific predeprivation procedures, state officials provided Fields with actual process . . ." Id. p. 99.

Finally, the Fifth Circuit in an en Banc decision, Caine v. Hardy, 943 F. 2d 1406, (5th Cir. 1991), the Court found no liability under §1983 where the hospital regulations state when, how and for what

reasons doctors may be disciplined." Id. at p. 1414.

The Admissions policy is undeniably vague as to who, where and when are applicants for public housing entitled to a hearing for denial of an application and federal preference for public house. The Court of Appeals, specifically stated in its opinion that "had established grievance procedures been in place and applicants been properly apprised thereof, the plaintiffs complaints could have been resolved without resort to needless litigation. Thus, the court recognized that grievance procedures to address admission issues were not in place; the Court, however, suggested to the Housing Authority to adopt and promulgate better grievance procedures . . ." The Court of Appeals is required to resolve an issue in a controversy between the parties and not

issue a mere advisory opinion. The Petitioners were seeking declaratory and injunctive relief and the Court should have stated how the denial of declaratory and injunctive relief can be reconciled with the finding that the PHA did not provide any type of forum to applicants of public housing who were deprived of a property right contrary to federal regulation and the Constitution.

The Court, therefore, should have declared that since the regulations and the Due Process Clause of the Fourteenth Amendment require the adoption of specific procedural guidelines to protect the Petitioners' property interest and that if the court determined that the Housing Authority had to establish appropriate grievance procedures, then liability could have been asserted against the PHA for failure to enact and adopt constitutionally firm policies. The misconduct of the non-policy makers is

irrelevant; the PHA and its Board of Directors failed to enact specific admissions policy to protect the Petitioners' interest and their failure to properly adopt said policies resulted in the deprivation of Petitioners right to obtain, decent safe and sanitary Housing. Under the mandates of Monell, supra, City of Canton, and Zinermon, supra, the Court should have found that because the PHA failed to enact a policy to protect the property interest of employees, the municipality is to be held liable under §1983.

II. The Question Presented Is Important.

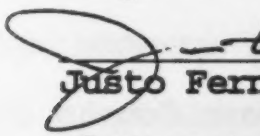
Hence, the issue before this Court is important in that there appears to be some confusion with the lower Courts in their interpretation of liability against municipalities; the lower courts are confused and believe that liability is limited to constitutional deprivation by

the policy-maker officials themselves. This case will establish whether or not the misconduct of non-policy maker employees, acting pursuant to constitutionally infirm policy which deprive Petitioners of their Constitutionally protected property right without a hearing can subject the municipality to liability under §1983. Therefore, the Court should grant the Petition.

CONCLUSION

The Petition for a writ of Certiorari should be granted.

Respectfully submitted,



Justo Fernandez-Gonzalez
Counsel of Record
El Paso Legal Assistance Society
1220 N. Stanton
El Paso, Texas 79902
(915) 544-3022
Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8662

D.C. Docket No. 91 CA 30 (S)

YOLANDA GOMEZ, ET AL.,

Plaintiffs-Appellants,

versus

THE HOUSING AUTHORITY FOR
THE CITY OF EL PASO, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas

Before KING and WIENER, Circuit Judges, and DOHERTY*, District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgement of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

April 4, 1994

ISSUED AS MANDATE: APR 26 1994

A true copy
Test:
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Marilyn A. Taylor
Deputy
New Orleans, Louisiana

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*District Judge of the Western District of Louisiana, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8662

YOLANDA GOMEZ, ET AL.,

Plaintiffs-Appellants,

versus

THE HOUSING AUTHORITY FOR
THE CITY OF EL PASO, ET AL.,

Defendants-Appellees.

Appeal from the United States District
Court For the Western District of Texas
(91-CA-30(S))

Before KING and WIENER, Circuit Judges, and DOHERTY, District Judge.[1*]

PER CURIAM[2**]

Plaintiffs-Appellants Yolanda and

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*District Judge for the Western District of Louisiana, sitting by designation.

**Local Rule 47.5 provides: "The Publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Manuel Gomez, Gerardo and Isabel Velasquez, and Maria Valadez-Gonzalez appeal the district court's judgment with respect to their 42 U.S.C. §1983 claim premised on a violation of procedural due process.

We have carefully considered the facts and legal arguments advanced by counsel in their briefs to this court and in their oral arguments to this panel, and have reviewed the record from the district court. Although there is evidence that housing officials' treatment of the plaintiffs was, to varying degrees, negligent or even abusive, in no instance did such mistreatment rise to the level of a constitutional tort cognizable under §1983. We, therefore, affirm the district court's judgment.

We do, however, express our disappointment with the apparent indifference exhibited towards housing

applicants by housing officials; had established grievance procedures been in place and applicants been properly apprised thereof, the plaintiffs' complaints could have been resolved without resort to needless litigation. We suggest, therefore, that the Housing Authority adopt and implement better grievance procedures and written promulgation thereof so as to improve communication between applicants and Housing Authority functionaries, minimize friction, adjust attitudes, and avoid litigation to the extent possible.

AFFIRMED.

A true copy
Test:
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Marilyn A. Taylor
Deputy
New Orleans, Louisiana

APR 26 1994

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

YOLANDA GOMEZ, MANUEL GOMEZ, MARIA VALADEZ-GONZALEZ, GERARDO VELASQUEZ, and ISABEL VELASQUEZ, Plaintiffs	§	
v.	§	CIVIL NO. EP-91-CA-30
THE HOUSING AUTHORITY OF THE CITY OF EL PASO and EDMUND CARRERA, in his capacity as Executive Director of the EL PASO HOUSING AUTHORITY, et al., Defendants	§	

MEMORANDUM OPINION AND ORDER

BE IT REMEMBERED on September 22 and 23, 1992, a non-jury trial in the above-styled and numbered cause was held before the Court. Having listened to the testimony of the parties and witnesses and the arguments of counsel, and having reviewed the file and exhibits presented during the trial, the Court finds that Plaintiffs have not proven by a preponderance of the evidence that any of the defendants violated Plaintiffs' rights under the United States Housing Act of

1937 (42 U.S.C. § 1437, et seq.) or under the Constitution of the United States, pursuant to 42 U.S.C. § 1983.

I. BACKGROUND

Plaintiffs are low-income residents of El Paso, Texas, who seek housing from the Housing Authority of the City of El Paso ("the EPHA"). Specifically, Plaintiffs have asked this Court to (1) declare that defendants violated 42 U.S.C. § 1437p (de facto demolition); (2) declare that defendants breached the annual contribution contract ("ACC") between HUD and the EPHA; (3) declare that defendants have violated Plaintiffs' civil rights under Section 1983 and their constitutional due process rights; (4) and enter a preliminary and permanent injunction:

a. Enjoining the further de facto demolition, destruction and deterioration of the Housing Authority projects.

b. Mandating the immediate rehabilitation of all vacant units so that they be occupied by applicants for public housing.

c. Mandating the immediate rental of all vacant units upon the completion of their rehabilitation.

d. Mandating the immediate repair of all defective conditions in all occupied units.

e. Mandating that defendants comply with the requirements of 24 C.F.R. 960.211

Plaintiffs' First Amended Complaint (July 19, 1991).

Plaintiffs filed this suit against the above-named defendants, the United States Department of Housing and Urban Development ("HUD"), and Jack L. Kemp, Secretary of HUD on January 24, 1991. Plaintiffs brought the suit as a class action, but on January 27, 1992, Judge Lucius D. Bunton denied the Plaintiffs' motion to certify the action as a class action. On February 21, 1992, Judge Bunton granted Defendants Kemp and HUD's

motion to dismiss for lack of standing because Plaintiffs failed to allege facts from which a reasonable fact finder could find those defendants had caused Plaintiffs injury or that any injury would be redressed if Plaintiffs' relief were granted. See Gomez v. The Housing Auth. of the City of El Paso, EP-91-CA-30-B (Order Feb. 21, 1992). Judge Bunton denied a motion for summary judgment by the remaining defendants on March 23, 1992. The case was reassigned to Judge Walter S. Smith on July 10, 1992, and reassigned back to Judge Bunton on July 29, 1992. Finally, on September 10, 1992, Judge Bunton transferred the case, by consent, to this Judge before whom the case was tried on September 22 and 23, 1992.

A. The Gomezes and Their Contentions

Plaintiffs Manuel Gomez and Yolanda

Gomez are a husband and wife with eight children. At the time Plaintiffs filed their First Amended Complaint, on July 19, 1991, the Gomezes had seven children and resided in a three-bedroom apartment for which they paid $435.00 a month, including utilities. The Gomezes did not consider themselves in need of public housing when the lawsuit was filed nor did they desire this Court to award them public housing. Rather, they were initially motivated to participate in this lawsuit in order to help other potential applicants. At the time of trial, the Gomezes were residing in a house and paid $360.00 a month for rent and approximately $100.00 a month for utilities. However, in August, 1992, the Gomezes were informed that the owner of the house was going to sell the house at which time they would have to leave. Thus, the Gomezes now desire public housing.

Mrs. Gomez filed an EPHA application for a five-bedroom apartment in 1988 or 1989. About a year after she filed the application, she began calling (6-7 times) the EPHA to determine her status on the waiting list. At the time, she and her family did not have a permanent place to live, but were living with friends or Mr. Gomez's mother.

One of the last times she called, an EPHA employee told Mrs. Gomez the application had been lost and could not locate it after looking for it under Mrs. Gomez's name, her husband's name, and under both of their social security numbers. Mrs. Gomez was told to go to the EPHA office, which she did at least two weeks to a month later. At the office she spoke to an EPHA employee named Yolanda who also could not locate the missing application. The employee did not call a supervisor, did not reinstate Mrs. Gomez

on the waiting list, and did not allow Mrs. Gomez to file a new application because the waiting list was closed. Mrs. Gomez was told to call back at the first of the month to check if the list for five-bedroom apartments would be open for that month. Mrs. Gomez has not called or attempted to file an application since that visit to the EPHA office, although the waiting list for five-bedroom apartments was open in March, September, and October 1990 and October 1991.[1]

B. The Velasquezes and Their Contentions

Isabel Velasquez and Gerardo Velasquez are a husband and wife with one three-year-old child. Gerardo Velasquez has epilepsy and receives Social Security disability checks in the amount of $422 each month. The monthly disability check

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[1]Neither defendants nor Plaintiffs supplied the Court with information indicating whether or not waiting lists were open or not after November 1991.

is the Velasquezes' only source of income. For about a year prior to November 1990 the Velasquezes called the EPHA once or twice a month to inquire about housing. At the time, the Velasquezes were living in various places, including a trailer without windows, without running water, without a heater, and with a broken toilet.

On November 12 or 13, 1990, Mrs. Velasquez called the EPHA and informed the person with whom she spoke that her husband was disabled and that they had a small child. The EPHA employee told Mrs. Velasquez that the one-bedroom list was open and that they were giving preference to disabled persons. The Velasquezes were led to believe that their three-member family qualified for a one-bedroom apartment. Mrs. Velasquez, Mr. Velasquez, and Mr. Velasquez's sister went down to the EPHA office (on November 12 or 13,

1990) and filled out an application for a one-bedroom apartment and turned it in to a woman employee. Both Mr. and Mrs. Velasquez testified that a second woman employee then came in and told Mrs. Velasquez that the Velasquezes did not qualify for a one-bedroom apartment, although the woman knew Mrs. Velasquez had a disabled husband and a young child under five-years old, and tore up the application. The Velasquezes were not allowed to reapply for a two-bedroom apartment at that time because the two-bedroom list was closed, but were told to keep calling to check on the

status of the two-bedroom waiting list.[2]

After November 12 or 13, 1990, the Velasquezes did not go to the EPHA office in person again until June or July of 1992 when they successfully filed an application for a two-bedroom apartment. Between November 1990 and November 1991 the two-bedroom waiting list was only open once, during the month of March 1991.

C. Ms. Valadez-Gonzalez and her Contentions

Plaintiff Maria Valadez-Gonzalez did not appear or testify at trial. According to

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2 In November 1990, the evidence established that the one and two-bedroom apartment waiting lists were closed. In october 1990, the one-bedroom apartment waiting list was open for elderly families only. The Department of Housing and Urban Development ("HUD") includes familes whose head or spouse is a disabled person in its definition of elderly families. 24 C.F.R. §960.405. And, Contrary to the testimony of Ms. Pat Michael, Eligibility Officer for the EPHA, the regulations do not distinguish between families considered elderly by virtue of a member's age and those considered elderly because of the disability of a member, but rather indicate that any family considered to be "elderly" must be given a preference for admission to projects for elderly families. 24 C.F.R. §960.407(a).

her deposition testimony, Ms. Valadez-Gonzalez has not yet applied with the EPHA, but calls each month to inquire about the status of the two-bedroom waiting list. With no further information, the Court, has no basis from which to discern whether or not Ms. Valadez-Gonzalez's rights have bren violated or whether or not she has been damaged and thus, as a matter of law, finds she is entitled to no relief in this lawsuit.

D. The Defendants

Defendant EPHA is a public housing agency authorized to develop and operate low-income housing under the United States Housing Act of 1937. See 42 U.S.C. § 1437a(6) (West 1992 Supp.). Defendant Edmund Carrera is the Executive Director of the EPHA and is sued in his official capacity. Defendants Rodolfo Hernandez,

Blanche Darley, Margarito Rodriguez, Ellie Fenton, and Rene Pena are members of the EPHA's five-member board, appointed by the Mayor of the City of El Paso, and are sued in their capacity as Directors of the EPHA[3]. Ms. Pat Michael, Eligibility Officer of the EPHA and is sued in her capacity as "manager" of the EPHA.

The EPHA is one of 31 large PHAs nationwide out of approximately 725 PHAs total. EPHA operates approximately 6000 units and maintains a waiting list with approximately 2000 families on it at a given time.[4] The waiting list is

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[3] Plaintiffs originally sued EPHA Board Members Carmen Leal, Myrna Deckert, Robert Ayoub, Tom Cardenas, and Rene Pena. however, as of September 22, 1992, Leal, Deckert, Ayoub, and Cardenas were replaced by Hernandez, Darley, Rodriguez, and Fenton, respectively.

[4] In addition to families with applications on file waiting for housing, there are approximately 1500 families already in public housing in El Paso who need to be transferred because their family size has increased or decreased.

organized by the number of bedrooms and by whether or not the applicant claims a Federal preference. In El Paso, families wait, on average, approximately three years[5] for housing once they have submitted an application.

As a public housing agency, EPHA receives funds (approximately 30-40% of its operating expenses) from HUD each year pursuant to an annual contributions contract ("ACC") and pursuant to budgets which EPHA submits to HUD for approval each year. EPHA also receives separate funds from HUD for modernization of existing housing under the Public Housing Comprehensive Improvement Assistance Program ("CIAP"). See 24 C.F.R. § 968.-101, et seq. In return, EPHA is required to comply with Federal statutes and regulations promulgated by HUD and, in the

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[5] According to Cathie Hughes, a housing management specialist for HUD, a three year wait is not unusual for a large PHA.

case of the CIAP program, to comply with approved deadlines for modernization or submit proposed revisions for approval if necessary.

II. PLAINTIFFS' CAUSES OF ACTION

In their First Amended Complaint, Plaintiffs assert three basic causes of action. First, Plaintiffs challenge the EPHA's application and Federal selection preference process and maintain that it is in violation of federal regulations. Second, Plaintiffs contend that EPHA has failed to maintain and properly manage its projects to the extent that hundreds of vacant units have become uninhabitable and have created a de facto demolition of these units in violation of 42 U.S.C. § 1437p. Third, Plaintiffs contend that the EPHA's alleged failure to maintain its projects and the de facto demolition resulting therefrom constitute a breach of the Annual Contribution Contract ("ACC"),

under which Plaintiffs maintain they are intended beneficiaries.

A. EPHA Application and Federal Selection Preference Policy

1. Plaintiffs' Right to Sue

[1]Section 1437d, Title 42, United States Code, requires that [e]very contract for contributions shall provide that -

(4)the public housing agency shall comply with such procedures and requirements as the Secretary may prescribe to assure the sound management practices will be followed in the operation of the project, including requirements pertaining to -

(A) . . . the establishment of tenant selection criteria which -

(i) . . . give preference to families that occupy substandard housing (including families that are homeless or living in a shelter for homeless families), are paying more than 50 percent of family income for rent, or

> are involuntarily displaced at the time they are seeking assistance under this Act. . . .

42 U.S.C. § 1437d(c) (4) (West Supp. 1992). Plainiffs do not allege that the EPHA's annual contribution contract with HUD does not contain such a provision, as required by Section 1437d. Thus, in order to sue, Plaintiffs must either have a private cause of action to sue to enforce HUD regulations or be entitled to sue as third party beneficiaries under the ACC between EPHA and HUD. There is support for allowing Plaintiffs to sue under either theory.

Section 1437d(c) (4) mandates that, under the ACC, a public housing authority comply with HUD regulations if and when established. Thus, once established, such regulations would have the force of law. See 42 U.S.C. § 1437d(c); see also Brafman v. United States, 384 F.2d 863, 866 (5th

Cir. 1967) (tax regulations "reasonably adapted to carry out the intent of Congress" have force of law); Gholston v. Housing Auth. of City of Montgomery, 818 F.2d 776, 783-87 (11th Cir. 1987) (plaintiffs could not sue housing authority for violating Section 1437d(c)(4) because during the times relevant to the lawsuit HUD had not yet adopted regulations implementing the preference provision). Assuming HUD's regulations concerning admission policies and preferences (24 C.F.R. §§960.201-960.409) are enforceable under Section 1983 to the same extent Section 1437d, the statute authorizing those regulations, is, the Court sees no reason to treat Section 1983 or those regulations any differently than Section 1437a or 1437p, which have been held to create privately enforceable

federal rights.[6] See Wright v. Roanoke Redevelopment and Housing, 479 U.S. 418, 432, 107 S.Ct. 766, 774 (1987) (1437a); Henry Horner Mothers Guild v. Chicago Housing Auth., 780 F. Supp. 511, 515 (N.D. Ill. 1991) (Section 1437p(d) creates an enforceable right against conduct resulting in "de facto" demolition of public housing); Tinsley v. Kemp, 750 F. Supp. 1001, 1009 (W.D. Mo. 1990) (same); but see Dessin v. Housing Auth. of City of Ft. Myers, 783 F. Supp. 587, 590 (M.D. Fla. 1990) (no private cause of action under Section 1437p for "de facto" demolition).

Furthermore, the Court also finds

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[6] Most of the specific regulations which Plaintiffs allege have been violated have all been in effect since at least July 13, 1988, which is within the relevant time period for this case. See 24 C.F.R. § 960.201-211. The regulations dealing with elderly families, which include families whose head or spouse is disabled, were adopted in May and June 1989, before the Velasquezes attempted to apply for a one-bedroom apartment in an elderly project. See 24 C.F.R. §§ 960.401-407.

Plaintiffs are intended third-party beneficiaries under the ACC between HUD and EPHA. Citing Sections 101 and 201 of the ACC between the Chicago Housing Authority and HUD, which identical to the ACC between EPHA and HUD, the court in Henry Horner Mothers Guild v. Chicago Housing Auth., stated "[t]he terms of the contract thus communicate that the purpose of the contract is to benefit public housing tenants, as well as low-income families generally, who are applicants and potential applicants of public housing." Henry Horner, 780 F. Supp. at 516 (emphasis added). Although the plaintiffs in Henry Horner were tenants and not potential applicants, the sections of the ACC cited above and Section 206,[7] as well

[7]Section 206 of the ACC requires the local housing authority to adopt, promulgate, and post, "for examination by prospective tenants, regulations establishing its admission policies [which] . . . must be reasonable and give full consideration to its public responsibility for rehousing displaced families . . . ."

as 42 U.S.C. § 1437,[8] certainly indicate that the ACC and the regulations which must be complied with thereunder were intended to benefit not just those persons who are tenants or are applicants on the waiting list, but also those persons who have attempted, but been unable, to get on the waiting list because of alleged violations of HUD regulations and the ACC. See id.; see also Tinsley, 750 F. Supp. at 1012.

2. Section 1983: Policies and Injury

In order to find the EPHA liable, Plaintiffs must show by a preponderance of the evidence that there existed a policy

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[8]Section 1437 of Title 42, United States Code, states, in part:

It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit . . . to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income. . . .

42 U.S.C. § 1437 (West Supp. 1992) ("lower income" was substituted in place of "low income" in 1981).

or custom by EPHA Board Members was personally involved in such a violation, which would in turn cause EPHA to be liable as Mr. Carrera and the Board Members are policymakers for the EPHA. See City of St. Louis v. Praprotnik, 485 U.S. 112, 123-27, 108 S.Ct. 915, 924-26 (1988); Tex. Loc. Gov't Code Ann. § 392.051 (Vernon 1988). Any violation by Ms. Michael, however would not cause the EPHA to be liable as "[w]hen an official's discretionary decisions are contrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the [housing authority]" unless an authorized policymaker approves the subordinate's decision and basis for the decision, which ratification would cause the housing authority to be liable for the decision. Id. at 127, 108 S.Ct. at 926.

Plaintiffs in this case presented no

evidence that Mr. Carrera or any Board Member of the EPHA violated HUD regulations or ratified actions of an EPHA official or employee that amount to violations of HUD regulations regarding admissions and Federal preferences. Therefore, there must have existed a policy or practice, "so permanent and well settled as to constitute a 'custom or usage' with the force of law," by the EPHA which violated HUD regulations in order for this Court to grant the declaratory and injunctive relief Plaintiffs desire. See id.

In addition, Plaintiffs must demonstrate they have been injured by such violations before they may recover under Section 1983. See 42 U.S.C. § 1983. Furthermore, if Plaintiffs were not injured by the defendants' conduct or if a favorable decision by this Court will not "redress" the injuries suffered by Plaintiffs, as

determined at the time the complaint was filed, then Plaintiffs will lack standing to sue at all. See Lujan v. Defenders of Wildlife, ____ U.S. ____, 112 S.Ct. 2130, 2136, 2141 n. 4 (1992).

Even considering the fact that the Gomezes, who at the time they filed this suit were not in need of housing, have recently been told they would have to move and thus are again in need of housing, there is no injury to any of the Plaintiffs caused by the EPHA's policies or customs regarding admissions or Federal preferences or an EPHA policymaker and redressable by this Court.

With regard to the individually named defendants, who are all sued in their official capacities, although Plaintiffs in their First Amended Complaint requested the Court to declare that the defendants violated Plaintiffs statutory, constitutional, and regulatory rights and

requested an injunction "[m]andating that defendants comply with the requirements of 24 C.F.R. 960.211 [Federal selection preferences]," Plaintiffs' focus in their pretrial order and at trial was injunctive relief against the EPHA. Furthermore, Plaintiffs provided no evidence of any violations by any of these defendants except Pat Michael, who is not a policymaker for the EPHA. While there is reason to believe Congress intended tenants, applicants, and even potential applicants to be able to sue PHAs for violating the Housing Act of 1937 and implementing regulations, there is no reason to believe Congress intended such plaintiffs to be able to sue individual, non-policymaking employees of a PHA for violations other than intentional violations of the Constitution.[9] However,

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[9] Apparently, the issue has never before arisen. At least this court found no case in which a plaintiff sued defendants other that a PHA, an executive director of a

even if a non-policymaking employee such as Ms. Michael could be sued for violating the Housing Act of 1937 and implemting federal regulations, as discussed later, Plaintiffs were not harmed by any alleged violations committed by Ms. Michael and, therefore, have no standing to sue. See id.

3. Federal Preferences

Federal regulations require that each public housing authority adopt and implement policies and procedures which give preference "to applicants who are otherwise eligible for assistance and who, at the time they are seeking housing assistance, are [1] involuntarily displaced, [2] living in substandard housing, or [3] paying more than 50 percent of family income for rent" [hereinafter referred to as "Federal

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PHA, HUD, or the Secretary of HUD in a case alleging violations of the Housing Act of 1937 and implementing federal regulations.

preferences" collectively]. 24 C.F.R. § 960.204(a), (b) (4) (1992). Applicants eligible for assistance and claiming a Federal preference may not be refused a place on the waiting list unless the PHA determines that there is an adequate pool of applicants likely to qualify for a Federal preference.[10] 24 C.F.R. § 960.207(b) (1992) (effective July 13, 1988). If there are more people than can be "served within a reasonable period of time," the PHA must close the waiting list. HUD Handbook, at § 2-3(a) (1) (c). There must be enough applicants to fill expected vacancies for at least several months before the waiting list is closed. Id. at § 2-3(b) (3).

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[10] During the period of time relevant to this lawsuit, approximately July 1988 through November 1990, not more than ten percent of applicants could be applicants without a federal preference and be provided assistance prior to applicants with federal preferences. 42 U.S.C. § 1437d(c) (4); 24 C.F.R. § 960.211(b) (2) (i), (ii) (1992) (effective July 13, 1988).

Also, "[b]efore executing a lease with an applicant who has been offered a unit on the basis of a Federal preference, the PHA must require the applicant to provide verification that he or she qualifies for a Federal preference . . . by virtue of the applicant's current status." 24 C.F.R. § 960.211(c) (3) (1992) (emphasis added).

Plaintiffs complain that the Defendants failed to apply the federal selection preferences required under HUD regulation and that Defendants failed to provide them notice and opportunity for a meeting, which is required when a Federal preference is denied, in violation of the Due Process clause of the Fourteenth Amendment. Specifically, Plaintiffs complain that the EPHA's practice of not verifying an applicant's Federal preference until approximately 30-60 days prior to being housed violates Section

960.211(c) (3). According to Plaintiffs, applicants without a preference are placed in front of applicants with preferences, causing the waiting list to be longer and closed more frequently and applicants with preferences to be housed later than they would be if EPHA complied with HUD regulations. Plaintiffs maintain that had EPHA screened for Federal preferences at the time of application, the Plaintiffs would have been able to submit applications ahead of many ineligible applicants. Plaintiffs also claim that the EPHA has been giving more weight to applicants displaced by the City in violation of HUD regulations.

Each of Plaintiffs' arguments regarding EPHA's Federal preference policies fails. At the time this lawsuit was filed none of the Plaintiffs had filed applications with EPHA; therefore, they had no applications to be screened by EPHA at the time the

applications were filed. As for their inability to obtain a place on the waiting list, there is no evidence that waiting to verify an applicant's Federal preference until 30-60 days before the EPHA estimates an apartment will be available for the applicant causes the waiting list to be longer or applicants with Federal preferences to be housed later than they would be if the screening took place at the time the application was filed. Most applicants for public housing in El Paso who are still in need of housing by the time their verification interview takes place qualify for a Federal preference. Thirty to sixty days is plenty of time for the EPHA to evaluate several applicants should the first applicant they interview no longer qualify for a Federal preference. Plaintiffs provided no evidence whatsoever of any delay caused by this procedure.

Furthermore, HUD regulations provide for a second verification to take place if "such a long time has elapsed since verification as to make reverification desirable, or the PHA has reasonable grounds to believe that the applicant no longer qualifies for a Federal preference." 24 C.F.R. § 260.211(c)((4) (1992). Thus, in almost all instances in El Paso, where the average wait is approximately three years, if Federal preferences were verified at the time an applicant initially filed an application, a second verification before executing a lease would be necessary under HUD regulations. Finally, as Plaintiffs were never interviewed and told they did not qualify for a Federal preference, there were never determinations that they did not qualify for Federal preferences, and no right to a review was triggered. See 24 C.F.R. § 960.211(k) (1992).

As for Plaintiffs' claim that EPHA violated HUD regulations by giving more weight to persons displaced by the City of El Paso, there is some evidence that in the past the EPHA gave persons displaced by the City of El Paso preferences over other displaced persons. Pat Michael, eligibility officer of the EPHA from 1987 to 1991, testified that a "long time ago", in about 1986, HUD told the EPHA the EPHA was giving preference to persons displaced by the City and that they were not allowed to do so. Cathie Hughes, a housing management specialist for HUD, testified in her deposition (admitted into evidence) that she thought she remembered discussing the fact, during a HUD Comprehensive Management Review/Occupancy Audit conducted September 18-22, 1989, that the EPHA could give preference to persons with City inspector notices over other displaced persons so long as they codified

the preference. However, there was no express finding in the report or any indication that corrective action was necessary.

Prior to July 13, 1988, when federal regulations implementing the Federal preferences became effective, PHA's were free to establish their own preferences, many of which were suggested in the Public Housing Occupancy Handbook issued by HUD in August 1987. See Public Housing Occupancy Handbook, at Sections 5-4 and 5-5 (HUD August 1987) ("HUD Handbood"); see also 24 C.F.R. § 960.211. After July 13, 1988, PHA's had discretion to rank persons with federal preferences by applying non-Federal preferences (e.g., person with Federal preference and meeting local residency preference has precedence over persons with only a Federal preference); to aggregate Federal preferences (e.g., two

Federal preferences take precedence over one Federal preference); to rank Federal preferences (e.g., displaced persons have greater preference than persons who pay more than 50% of income for rent); or to rank Federal preference definitional elements (e.g., persons whose housing "has been declared unfit for habitation by an agency or unit of government . . . take precedence over" other persons whose housing is substandard). 24 C.F.R. § 960.211(b) (2) (iii). Thus, the EPHA's ranking of persons with Federal preferences displaced by the City over other persons with Federal preferences was permissible before and after July 13, 1988.

The only potential problem appears to have been that the EPHA may not have stated in writing that it was applying such a ranking of preferences. However, EPHA's written admission policies dated

July 26, 1989, do state in writing that persons "displaced by City Code Enforcement activities in addition to one or more of the above [Federal preferences] . . . take precedence over other applicants with a preference." Statement of policy Governing Admission to , and Continued Occupancy of, Lower-Income Public Housing Projects Owned and Operated by the Housing Authority of the City and County of El Paso, Texas, § IV(E) (1) (c) (EPHA July 26, 1989).[11]

Thus, at best, the EPHA was applying a permissible preference, although not in writing, for some period of time prior to

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[11] On January 21, 1992, EPHA published a revision of the Statement of Policy Governing Admission to, and Continued Occupancy of, Lower-Income Public Housing Projects Owned and Operated by the Housing Authority of the City and County of El Paso, Texas, which no longer contains the preference for persons displaced by the City. See Statement of Policy Governing Admission to, and Continued Occupancy of, Lower-Income Public Housing Projects Owned and Operated by the Housing Authority of the City and County of El Paso, Texas § IV(E) (1) (c) (January 21, 1992).

July 26, 1989. Plaintiffs have not demonstrated that such an unwritten policy prior to July 1989 caused the waiting list to be longer or the Plaintiffs to be unable to apply for or obtain public housing. Presumably such an unwritten policy would not have made the waiting list any longer or caused it to be closed earlier, but would simply have affected the order that housing was granted to persons with Federal preferences already on the waiting list.

Plaintiffs have not demonstrated any policy by EPHA which violates HUD regulations regarding Federal preferences or which has caused them to be denied a place on the waiting list for housing, a Federal preference, or public housing.

4. EPHA Application Process

Isabel and Gerardo Velazquez complain that an EPHA employee tore up their application for a one-bedroom

apartment in an elderly housing project on November 12 or 13, 1990, after another EPHA employee told them preference was being given for disabled applicants and allowed them to fill out an application for a one-bedroom apartment. Yolanda and Manuel Gomez complain that about a year after they filed an application for a five-bedroom apartment in 1988 or 1989 the EPHA lost their application and did not reinstate their application or allow them to fill our a new application because the waiting list for five-bedroom apartments was closed at the time the application was discovered missing.

Plaintiffs claim that the Velasquezes should have been allowed to apply for a one-bedroom apartment in an elderly project because HUD allows an infant to share a bedroom with his or her parents and because a disabled person such as Mr. Velasquez is defined as an elderly person.

They claim EPHA should have had a definition for "infant". Plaintiffs also contend that EPHA personnel had discretion to give out applications when the waiting list was closed in violation of HUD regulations.

The Court has no evidence but that the Velasquezes' application was torn up and the Gomezes' application was lost. However, Plaintiffs provided no evidence, nor did they even contend, that the EPHA had a policy or custom of tearing up or losing applications. The tearing up of the Velasquezes' application was an intentional act on the part of an individual employee for which the EPHA is not responsible. There is similarly no evidence that the loss of the Gomezes'application was anything but an inadvertent, at best negligent, occurrence for which no one is to blame. The Court was concerned with the response by the

EPHA employee to the Gomezes' lost application. The Gomezes probably should have been allowed to fill out a new application and have it reinstated to the approximate position their lost application would have had on the waiting list, but again, there is no evidence that the failure of the EPHA employee to do so was a result of an EPHA policy or custom or that it was ratified by an EPHA policymaker. In fact, the Gomezes conceded they did not attempt to talk to the employee's supervisor then or at any time prior to filing this lawsuuit.

No statute or HUD regulation specifies the size bedroom an applicant is entitled to request on his or her application. HUD Handbook, at § 5-1(a)(1). The regulations do require a PHA to "adopt and implement policies and procedures employing standards and criteria for tenant selection which take

into consideration the needs of individual families for public housing and the statutory purpose . . . " and which are "specific and describe in detail the criteria, standards and preferences to be applied." 24 C.F.R. § 960.204(a), (d) (3) (1992).

HUD does, however, in its 1987 Occupancy Handbook, give PHAs quite a bit of guidance in how to set occupancy standards. HUD suggests PHAs consider "the age, sex, and relationship of family members" and "special needs or circumstances in the community." HUD Handbook, at § 5-1(b) (1) (a), (c). As an example, HUD further lists guidelines which other PHAs have used in setting their occupancy standards.[12]

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[12] Section 5-1(b) states, in part:

> (2) Some PHAs have found the following guidelines to be helpful in setting their occupancy standards:

EPHA has adopted some of these standards, including the chart for the minimum and maximum number of persons to be assigned to apartments according to the number of bedrooms, which provides for a

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(a) Generally two persons per bedroom.

(b) Persons of different generations, persons of the opposite sex (other than spouses), and unrelated adults, should have separate bedrooms.

(c) Children of the same sex should share a bedroom.

(d) Children, with the possible exception of infants, should not share a bedroom with parents.

(e) Persons with verifiable medical needs or other extenuating circumstances should be provided a larger unit.

(3) Some PHAs have adopted the following table:

# OF BEDROOMS	# OF PERSONS	
	Minimum	Maximum
0	1	1
1	1	2
2	2	4
3	4	6
4	6	8
5	8	10

HUD Handbook, at § 5-1(b) (2), (3) (emphasis added).

minimum of one person and a maximum of two persons in a one-bedroom apartment, and including the following provision:

> Generally, there will be no more than two persons per bedroom. The maximum number of persons per bedroom listed below may be exceeded to permit an infant to share a bedroom.

EPHA Statement of Policy, § V (C) (1) (a), (4) (1989 & 1992) (emphasis added). Thus, there is no federal regulation or even EPHA policy requiring that a couple with an infant be allowed to apply for a one-bedroom apartment. The only evidence that EPHA ever actually made such an exception for a couple with an infant is a January 1988 notice listing the size apartments for which applications could be placed in January 1988. The notice, published in English and Spanish in the newspaper and posted at the EPHA office, had written on it, in English and in receptionist Yolanda Santillan's handwriting, "couples can apply even w/a child under age 5."

However, eligibility officer Pat Michael testified a definition of infant has never existed because they just count the number of people, i.e., the exception is never utilized. Thus, it appears that no official policy to allow couples with one child under the age of five to apply for one-bedrooms existed or, if it did, it does not exist now nor is there any evidence that it existed in November 1990 when the Velasquezes attempted, with their young daughter, to apply for a one-bedroom apartment. Since such a policy is merely permitted, not required, by HUD, the Court cannot find its lack of existence or the lack of a specific definition of "infant" to be a violation of HUD regulations.

The Plaintiffs are correct, however, that the Velasquezes qualified to live in a project set aside for elderly families. Contrary to Ms. Michael's testimony that a family which is defined as "elderly"

because the head or spouse of a family is "disabled" qualifies for a financial deduction but not for housing in an elderly project, federal regulations do not make such a distinction. See 24 C.F.R. § § 960.405, 960.407 (1992) effective in 1989). Rather, if the head or spouse of a family, such as Mr. Velasquez, is disabled, the family must be given a preference in determining priority for admission into a project for elderly families no matter what the disabled person's age or whether or not the family has children. See id.; HUD Handbook, § 5-2(b) (2), (3).[13]

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[13] Section 5-2 of HUD's Public Housing Occupancy Handbook states, in part:

> (2) PHAs may not set a minimum age (like 50 or 55) for the admission of handicapped or disabled persons to projects for the elderly.
>
> (3) PHAs may not exclude elderly families with children from projects for the elderly having units of the appropriate size.

HUD Handbook, § 5-2(b). Although this handbook was

Nonetheless, the Velasquezes were not harmed by this error or even by the fact that they were not allowed to apply for a one-bedroom apartment. On the dates the Velasquezes say they attempted to file an application, November 12 or 13, 1990, the waiting list for one-bedroom apartments (regular and elderly) was closed, as was the waiting list for two-bedroom apartments (regular and elderly). Defendant's Exhibit H.

Evidence that Ms. Michael may, on occasion, have accepted applications after the waiting list was closed does not change that result. EPHA receptionist Yolanda Santillan testified during her deposition, but denied at trial, that applications were accepted after the end of the month in which the waiting list was

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issued in 1987, there have been no statutory or regulatory changes since that time which would require a change to the above sections.

open, even though the waiting list for that size apartment might be officially closed at that time. Similarly, EPHA receptionist Elizabeth Bustamante testified during her deposition, but denied at trial, that, at the discretion of Ms. Michael, applications would either be accepted only until the end of the month or until the new list came out -- usually about the tenth of the month. Ms. Michael denied that such a practice ever occurred.

Plaintiffs attempted to bolster this evidence by demonstrating that in the month of November 1990 applications were accepted on the first, fifth, thirteenth, fifteenth, and nineteenth, despite the fact the waiting list was closed for all size apartments that month, and that in the month of July 1990 five applications were accepted when the waiting list was closed. Plaintiffs information comes from

computer printouts listing those dates as dates on which applications were filed. Ms. Michael, however, testified that when an applicant refuses a suitable apartment offered, the applicant is dropped to the bottom of the waiting list; thus, the new effective date of application would be the date on which the applicant made the refusal, which may or may not be a date when EPHA is otherwise accepting applications for apartments of that size. This explanation is consistent with EPHA's policies which, in 1990, stated:

> Applicants shall receive the one offer to a suitable unit (by size and type) that has been vacated the longest. . . . The applicant must accept the offered unit or be moved to the bottom of the Waiting List, with a new listing date being the date of refusal.

EPHA Statement of Policy, at § V(D) (2) (c) (July 26, 1989) (emphasis added).[14]

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[14] In 1992, the same section was changed slightly to omit the words "that has been vacated the longest, "but otherwise remained the same. EPHA

Ms. Michael's explanation and EPHA's policy are also consistent with HUD's Occupancy Handbook, which suggests PHAs adopt one of two plans to handle an applicant's refusal of an offer of a suitable apartment. One suggested plan provides:

> If the applicant refuses [a suitable unit], the applicant's name goes to the bottom of the waiting list.

HUD Handbook, at § 5-7(a) (4) (a).

Even taking as true Santillan and Bustamante's deposition testimony that Ms. Michael sometimes extended the acceptance of applications for apartments into the next month when the waiting list was closed for that size apartment, that testimony only establishes that the waiting list would remain open until the next waiting list was published on approximately the tenth of the next month. The November 1990 waiting list became

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Statement of Policy, at § V(D) (2) (c) (January 21, 1992).

effective on November 12, 1990, a date on which the EPHA office was closed for Veteran's Day. See Defendant's Exhibit H. Thus, the earliest date the Velasquezes could have attempted to file their application was November 13, 1990, a date when even if the waiting list for one-bedroom elderly apartments had been left open until the November list became effective, the list would already have been closed and no applications received.[15] Moreover, as the evidence produced by Plaintiffs, at best, showed that approximately five applications were accepted per month when the waiting list was closed, the Court finds Plaintiffs were not prevented from filing applications or receiving housing as a result of Ms. Michael's violation if any.

Furthermore, Ms. Michael is not a

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[15] The waiting list for one-bedroom apartments for elderly and disabled families was open in October 1990.

policymaker for the EPHA. Her practice of sometimes leaving the waiting list open until the next month's list became effective cannot be attributed to the EPHA as Plaintiffs have provided no evidence that Mr. Carrera or any EPHA Board Member was aware of, much less ratified or condoned, such a practice.

B. De Facto Demolition

1. Plaintiffs' Right to Sue

In their complaint, Plaintiffs complain that EPHA has left vacant a high number of units with the intention of demolishing them and has failed to maintain and properly manage the projects causing "hundreds of vacant units to become uninhabitable," constituting a "de facto" demolition in violation of 42 U.S.C. § 1437p and 24 C.F.R. §§ 970.4 - 970.12 (1992). Plaintiffs want this Court to halt any proposed demolition until obsoleteness has been proven and order the

EPHA to immediately rehabilitate and/or repair all vacant units and then rent them to applicants.

Section 1437p(d), Title 42, United States Code, states:

> A PHA may not take any action to demolish or dispose of a public housing project or a portion of a public housing project without obtaining approval of the Secretary [of HUD] . . . .

In turn, HUD may not approve an application for demolition unless the PHA's application was developed in consultation with tenants in the project where proposed demolition would take place and the project, or portion of the project to be demolished is

> obsolete as to physical condition, location, or other factors, making it unusable for housing purposes and no reasonable program modifications, in keeping with the Comprehensive Improvement Assistance Program (CIAP) regulations . . . is feasable to return the project or portion of the project to useful life.

42 U.S.C. § 1437p(b) (1) (tenant consultation); 24 C.F.R. § 970.4 (same);

24 C.F.R. § 970.6 (obsoleteness).

Since the amendment of Section 1437p to add subsection (d), the majority of district courts to consider the issue have held that section and the accompanying legislative history[16] to mean Congress intended applicants of public housing to be able to maintain private causes of action against PHAs for de facto demolition of public housing. See Henry Horner, 780 F. Supp. at 515; Tinsley, 750 F. Supp. at 1009; Concerned Tenants Ass'n of Father Panik Village v. Pierce, 685 F. Supp. 316, 321 (D. Conn. 1988); but see

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[16] The legislative history states, in part:

> This provision is intended to correct an erroneous interpretation by the United States Court of Appeals for the D.C. Circuit in Edwards v. District of Columbia and shall be fully enforceable by tenants of and applicants of the housing that is threatened.

H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess. (1987), reprinted in 1987 U.S.C.C.A.N. 3317, 3458 (emphasis added).

Dessin, 783 F. Supp. at 590 (decided before Henry Horner). As Plaintiffs complaint is, in part, that because of the EPHA's alleged de facto demolition of public housing in El Paso, less housing is available causing them to be unable to get on the waiting list, the Court can discern no reason why Plaintiffs (who are not on the waiting list or only obtained a place on the waiting list in July of 1992) should be less entitled to sue than persons who were actually on the waiting list at the time this lawsuit was filed.

2. Plaintiffs' Evidence of De Facto Demolition

Plaintiffs have not produced evidence showing by a preponderance of the evidence that EPHA has a policy of allowing public housing units to deteriorate and/or stand vacant for excessively long periods of time resulting in a de facto demolition. The credible

evidence presented at trial demonstrates that long-standing vacancies in EPHA projects have been due to either modernization under the CIAP program or plans to demolish units.

a. Vacancies Due to Proposed Demolition

With regard to units left vacant for proposed demolition, Plaintiffs produced absolutely no evidence that such units became uninhabitable as a result of any action or inaction on the part of the EPHA. In the Kathy White Project, the EPHA has applied to HUD for the demolition of eighteen units which have bad foundations and have accordingly been left vacant pending demolition. Although the application has not yet been approved, Plaintiffs did not produce evidence questioning the need to demolish those units or the EPHA's compliance with HUD regulations regarding the application for

demolition process. Furthermore, EPHA produced undisputed evidence that, as required, eighteen units have already been purchased, see 24 C.F.R. § 970.4 (e); therefore, there are no less units available to Plaintiffs as a result of the proposed demolition at Kathy White.

The only other units left vacant as a result of proposed demolition were at the Salazar Project. Following complaints from residents living in building under a newly built overpass, EPHA vacated those buildings as a result of the residents' complaints and in anticipation of demolition. The proposed demolition was abandoned and those buildings are now being prepared for rental. Again, Plaintiffs produced no evidence that EPHA purposefully allowed those units to become uninhabitable or violated HUD regulations. Rather, the evidence shows proposed demolition resulted from resident

complaints, which if they had persisted and demolition been carried out would in all likelihood have caused the units to qualify as obsolete due to location under HUD regulations. See 24 C.F.R. § 970.6(a).

b. Vacancies Due to Modernization Under CIAP

Plaintiffs also did not produce evidence demonstrating that vacancies not resulting from proposed demolition were the result of any EPHA policy other than EPHA's policy to modernize projects under the Comprehensive Improvement Assistance Program ("CIAP"). Under CIAP, projects, or portions thereof, in need of restoration are to be modernized under comprehensive plans, which means individual units are not to be restored in a piecemeal fashion, but rather entire communities are to undergo modernization at one time. See Public and Indian

Housing Comprehensive Assistance Program Handbood [hereinafter CIAP Handbook], § 1-39(d) (December 20, 1989); see also 24 C.F.R. § 968.305. Thus, EPHA must either wait for units to be vacated naturally, until all units in a project in need of modernization are empty, or transfer residents to other units or other projects. Either way, unless substantial numbers of new units or scattered-site houses are purchased, some units must necessarily remain vacant for a period of time before modernization can take place.

Furthermore, HUD anticipates a three to five year implementation period for each modernization project. A schedule for implementation is submitted to HUD for a project by the PHA and, once approved, may not be exceeded "unless a time request has been approved [by HUD] or is pending." Plaintiffs' Exhibit #11 (Notice from HUD to PHAs concerning "Comprehensive

Improvement Assistance Program (CIAP) - Policies and Procedures for Termination of Modernization Projects Where All Funds Have Not Been Obligated, April 15, 1987); see also CIAP Handbook, at § 10-8(c); 24 C.F.R. § 968.320(e) (1992). Such revisions, extending or changing deadlines in the implementation schedule, are routine according to Rudolph Kuusisto, a HUD engineer who performs CIAP monitoring visits and reviews. See Kuusisto Deposition, at 21, 77. In addition, in 1992, HUD implemented new regulations which gave large PHAs, such as the EPHA, considerably more flexibility in implementing the CIAP program, including timing. See 24 C.F.R. § 968.301; see generally 24 C.F.R. §§ 968.301 - 968.345 (1992). Although not in effect before or at the time this lawsuit was filed, these new regulations indicate HUD considers large PHAs to have a greater need for

flexibility in implementing the CIAP program.

At the Robinson Project, 45 units have been vacant since approximately 1989 and 12 since some time after April of 1991. Repairs were begun in November of 1991, and only approximately six to twelve units were finished as of January 1992 (at most a three year period). Plaintiffs consider this to be too long and want this Court to order repairs to be made immediately so these units can be rented to applicants. HUD, however, allows PHAs to take between three to five years to perform modernization of a project, provided the time schedule, including revisions thereto, has been approved. Plaintiffs provided no evidence that modernization at Robinson was to be completed sooner under a HUD-approved implementation schedule.

Yolanda Carpio, an assistant manager

at the Salazar Project, testified sixty units at Salazar were vacated beginning in 1990 because, she was told, they were to be modernized. The modernization never took place, but instead regular maintenance and repainting was performed and the units were assigned "very quickly". Similarly, Herlinda Espinoza testified ten to twelve units at the Manchuca Project were vacated in 1990 for modernization, but in late 1991 families moved in to those units before modernization took place. Plaintiffs offered no evidence as to why modernization was not done at either Salazar or Manchuca or whether the failure to modernize violated HUD regulations or the ACC; therefore, the Court can find no violations took place. As Plaintiffs want this Court to order EPHA to repair and rent out vacant units as soon as possible, and these units are no longer vacant, the

Court can discern no potential harm to Plaintiffs either.

Plaintiffs also presented, as evidence of mismanagement of the CIAP program, the fact that EPHA was denied its request for $11 million in CIAP funds for fiscal years 1990 and 1991, because it had accumulated $14 million in unspent CIAP funds which HUD concluded it could not spend in three years at its current average spending rate of $4 million per year. Again, though, there is no evidence that this denial of funds by HUD indicates that the EPHA was in violation of HUD regulations or the ACC or that this denial or EPHA's accumulation of $14 million in unspent CIAP funds caused excessive numbers of vacancies.

Not only did Plaintiffs provide no proof that the EPHA's implementation of the CIAP program has caused de facto demolition of any units, or otherwise

violated HUD regulations, but Bill Canales, HUD's director of Public Housing for Region VI (Texas, Oklahoma, Louisiana, Arkansas, and New Mexico), testified that although HUD has found the implementation of CIAP improper at some PHAs in the past, it has not found the EPHA's implementation of CIAP improper in the past five years.[17] According to Mr. Canales, EPHA has complied with all federal regulations with respect to the CIAP program. Furthermore, while August 1989 findings by HUD, made after a Modernization Monitoring Visit for EPHA's 1984, 1985, 1986, 1987, and 1988 CIAP programs, did indicate that at that time EPHA did not know where it was going, amongst other findings, Rudolph Kuusisto testified that all those findings were

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[17] According to Mr. Canales, HUD Director of Public Housing for Region VI, HUD performs reviews of A PHA's modernization/CIAP program four times a year; a PHA's finances once a year; a PHA's general management once a year; and a PHA's emergency CIAP program once a year.

cleared because EPHA complied with all of the recommendations or corrections. See Kuusisto Deposition, at 74-75; see also CIAP Handbook, § 10-17(a)(3), §19-18 § 10-19 (HUD may terminate an approved modernization program or find the PHA in substantial breach of the ACC if the PHA is unable to correct an identified deficiency) (emphasis added).

c. Vacancies in General

In addition to the evidence regarding specific projects described above, Plaintiffs generally contend that the rate of vacancies at EPHA is too high and is in violation of HUD regulations, which require a PHA's vacancy rate to be three percent or less.[18] See Exhibit H-1, at 2, attached to Hughes Deposition (admitted into evidence). Plaintiffs' expert witness, Professor Henry King, a professor

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[18] Units held vacant for modernization are not considered "vacant" by HUD when calculating a PHA's vacancy rate.

at the University of Texas at El Paso, testified that, using a spread sheet to analyze EPHA computer printouts, he concluded that in May of 1991 there were 1491 vacancies (out of a total of 6000 units), of which only 31.84% were held vacant for modernization. When questioned, however, Professor King admitted that if one unit was vacant for two or more periods, each period of vacancy would be counted as a vacancy so that the 1491 vacancies does not mean 1491 units were vacant at one time. Thus, Plaintiffs have no evidence that EPHA's rate of vacancies exceeds HUD's permissible three percent rate.

Pat Michael testified HUD had not found that EPHA exceeded a three percent vacancy rate in the past four to six years. Edmund Carrera, EPHA Executive Director since 1986, testified HUD had never told the EPHA it had a problem with

high vacancies. The report generated from HUD's Comprehensive Management Review/Occupancy Audit of the EPHA, September 18-22, 1989, shows that EPHA had a 97% occupancy rate in compliance with HUD standards. Exhibit H-1, at 2, attached to Hughes Deposition.

Plaintiffs' evidence of a high vacancy rate is inconclusive and speculative at best. EPHA's evidence, on the other hand, is credible and consistent and reveals no high vacancy problem at EPHA.

C. Breach of the Annual Contribution Contract (ACC)

Plaintiffs contend that EPHA has substantially breached the ACC[19] between EPHA and HUD as a result of violating the 1937 Housing Act, HUD regulations, and HUD standards as discussed above. In support,

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[19] Recall the Court has already determined Plaintiffs can sue for breach of the ACC as third party beneficiaries. See p. 9, supra.

Plaintiffs cite EPHA's accumulation of $14 million in unobligated CIAP funds and HUD's resulting denial of further funding for the fiscal years 1990 and 1991. Plaintiffs also cite EPHA's alleged high number of vacancies and revisions of CIAP implementation plans.

While failure to timely obligate funds or implement CIAP plans may result in a substantial breach of an ACC, HUD makes the determination of what is or is not a substantial breach. Furthermore, revision of an implementation schedule is not in violation of HUD regulations or the ACC unless the revision is not approved by HUD. See Plaintiffs' Exhibit #11 (Notice from HUD to PHAs concerning "Comprehensive Improvement Assistance Program (CIAP) - Policies and Procedures for Temination of Modernization Projects Where All Funds Have Not Been Obligated, April 15, 1987); see also CIAP Handbook, at § 10-8(c); 24

C.F.R. § 968.320(e) (1992); Kuusisto Deposition, at 21, 77; 24 C.F.R. § 968.320(e), § 968.325(c) (1992) (HUD approved comprehensive plan binding on HUD and PHA "until such time as the PHA submits, and HUD approves, an amendment to its plan"). Plaintiffs have provided no evidence that revisions to any implementation schedules have been made without HUD approval.

In light of the Court's findings above that the defendants have not violated federal statutes, federal regulations, or HUD standards, an in light of Plaintiffs' failure to provide any other evidence of a breach of the ACC by the EPHA, the Court finds the defendants have not breached the ACC between the EPHA and HUD.

III. CONCLUSION

Plaintiffs have not proven by a preponderance of the evidence that any of

the defendants violated the 1937 Housing Act, HUD regulations regarding public housing, HUD standards, or the ACC between HUD and EPHA. The credible evidence at trial showed only that employees of the EPHA may have acted negligently in advising Plaintiffs and losing the Gomezes' application and that an EPHA employee Ms. Pat Michael, who is not a policymaker for the EPHA, may have violated EPHA's policy of not accepting applications past the end of the month during which newspaper notices and notices posted at the EPHA indicated the waiting list for various size apartments was open. Plaintiffs presented no evidence that EPHA had any policies which violated Congressional statutes or HUD regulations or standards regarding admissions, Federal preferences, demolition (de facto or otherwise) of public housing units, vacancy rates, or modernization of public

housing under CIAP. Nor did Plaintiffs prove beyond a preponderance of the evidence that they were injured by the acts or omissions of any defendant.

The Court will enter a judgment in accordance with this opinion and holds that Plaintiffs take nothing in this action against Defendants EPHA, Edmund Carrera, Rodolfo Hernandez, Blanch Darley, Margarito Rodriguez, Ellie Fenton, Rene Pena, and Pat Michael.

SIGNED and ENTERED this _____ day of October, 1992.

/s/
SAM SPARKS
United States District Judge

Supreme Court, U.S.
FILED
JUL 29 1994
OFFICE OF THE CLERK

No. 94-148

In The

Supreme Court of the United States

October Term, 1994

YOLANDA GOMEZ and MANUEL GOMEZ, MARIA VALADEZ-GONZALEZ, GERARDO VELASQUEZ and ISABEL VELASQUEZ,

Petitioners,

v.

THE HOUSING AUTHORITY OF THE CITY OF EL PASO, EDMUND CARRERA, in his capacity as Executive Director of the El Paso Housing Authority, EPHA Board of Commissioners, RODOLFO HERNANDEZ, BLANCHE DARLEY, MARGARITO RODRIGUEZ, ELLIE FENTON, RENE PENA, and PAT MICHAEL, in her capacity as Eligibility Coordinator for EPHA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD W. DUNBAR
Counsel of Record

MICHAEL C. CROWLEY
CHRISTIE, BERRY & DUNBAR
1700 North Stanton
El Paso, Texas 79902
915/532-3638

Counsel for Respondents

July 29, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

Petitioners, in stating their single question, have made several assumptions with which respondents disagree. These assumptions are based on only two alleged incidents involving public housing applications. Employees of the Housing Authority of the City of El Paso are said to have lost one application, and to have destroyed another.

Unlike the question stated by petitioners, the negligent and aberrant acts alleged did not occur pursuant to any policy or custom. No policy maker acted in the manner alleged. Not only were the acts unauthorized, but they were discrete and isolated incidents.

The assumption that the Housing Authority denied petitioners the right to file applications is partially true, but misleading. At the time of the incidents **no one** was permitted to file an application because the waiting list was legitimately closed.

Respondents, therefore, would expand petitioners' single question to two questions, restated as follows:

1. In the absence of an enabling policy or custom, may the loss and destruction of public housing applications, occurring only as discrete and isolated incidents, form the basis of municipal liability?

2. In the absence of an enabling policy or custom, may the loss and destruction of public housing applications, occurring only as discrete and isolated incidents, form the basis of a procedural due process violation?

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No. 94-148

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YOLANDA GOMEZ and MANUEL GOMEZ, MARIA VALADEZ-GONZALEZ, GERARDO VELASQUEZ and ISABEL VELASQUEZ,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Housing Authority of the City of El Paso ("Housing Authority"); the Executive Director, Edmund Carrera; the members of the Board of Commissioners; and the Eligibility Coordinator, Pat Michael, Respondents herein,

pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

Petitioners' appendices set forth the relevant opinions of the courts below.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, of other proper proceeding for redress.

42 U.S.C. § 1437d(c)(4) provides:

> Every contract for annual contributions shall provide that -
>
> (4) the public housing agency shall comply with such procedures and requirements as the Secretary may prescribe to assure that sound management practices will be followed in the operation of the project . . .

24 C.F.R. § 960.207(b) provides:

> When a determination has been made that an applicant is eligible and satisfies all requirements for admission, including the tenant selection criteria, the applicants must be notified of

the approximate date of occupancy insofar as that date can be reasonably determined. Notwithstanding the fact that the PHA [Public Housing Authority] may not be accepting additional applications for tenancy because of the length of the waiting list, the PHA may not refuse to place an applicant on the waiting list if the applicant is otherwise eligible for assistance and claims that he or she qualifies for a Federal preference as provided in § 960.211, unless the PHA determines, on the basis of the number of applicants who are already on the waiting list and who claim a Federal preference, and the anticipated number of project admissions, that -

(1) There is an adequate pool of applicants who are likely to qualify for a Federal preference, and

(2) It is unlikely that, on the basis of the PHA's system for applying the Federal preferences, the preference or preferences that the applicant claims, and the preferences claimed by applicants on the waiting list, the applicant would qualify for assistance before other applicants on the waiting list.

24 C.F.R. § 960.211(c)(3) provides in pertinent part:

Before executing a lease with an applicant who has been offered a unit on the basis of a Federal preference, the PHA must require the applicant to provide verification that he or she qualifies for a Federal preference under paragraph (c)(1) of this section by virtue of the applicant's current status.

24 C.F.R § 960.211(k) provides in pertinent part:

Notice and opportunity for a meeting where Federal preference is denied. If the PHA determines that an applicant does not meet the criteria for receiving a Federal preference, the PHA must

promptly provide the applicant with written notice of the determination. The notice must contain a brief statement of the reasons for the determination, and state that the applicant has the right to meet with the PHA's designee to review it.

STATEMENT OF THE CASE

In their attempt to articulate a claim of constitutional dimensions, petitioners have failed to restate their individual fact situations. Their general claim is that the Housing Authority routinely denied due process to public housing applicants who had federally mandated preferences for housing. The underlying facts do not support this collective claim of constitutional deprivation.

The relevant facts presented by Manuel and Yolanda Gomez were that the Housing Authority had lost their application to rent an apartment, and then refused to reinstate them on the waiting list. *Gomez* v. *Housing Authority of the City of El Paso*, 805 F. Supp. 1363, 1365 (W.D. Tex. 1992). The basis of the claim of Isabel and Gerardo Velasquez was that they were told to come to the Housing Authority office and fill out an application, but, upon arriving and completing it, the application was rejected. *Id.* at 1365-66. According to the Velasquezes they had been led to believe they qualified for housing by one employee, only to have another employee tell them this was incorrect. The second employee tore up the application in their presence. The other original plaintiff, Maria Valadez-Gonzalez, did not appear or testify at trial.

Petitioners' suit rests on a lost application and a torn up application. The trial court was confronted with an alleged act of negligence, together with another act

which, if believed, was rude, unfeeling and aberrant. These acts, without more, could not form the basis of a constitutional infringement, and both the trial court and court of appeals so found.

The Gomez and Velasquez families were among the thousands of persons annually seeking housing from the Housing Authority. Applications are not always accepted because of the large backlog of prior applications. The Department of Housing and Urban Development ("HUD") permits closing the application process if there are more housing applicants than can be "served within a reasonable period of time." *HUD Handbook*, § 2-3(a)(1)(c).

Those persons who have already applied remain on the waiting list, but no new applications are added to the list. There must be, as the trial court found, enough applicants to fill expected vacancies for at least several months before the waiting list is closed. *Gomez*, 850 F. Supp. at 1370, citing *HUD Handbook*, § 2-3(b)(3). After getting placed on the list, the wait in El Paso is approximately three (3) years, a time period not unusual in the nation's large public housing complexes. The El Paso Housing Authority is one of the 31 large housing authorities out of some 725 authorities operating in the United States.

Applicants with federal preferences, however, may not be refused a place on the waiting list unless the housing authority "determines that there is an adequate pool of applicants likely to qualify for a Federal preference." *Id.* at 1369, citing 24 C.F.R. § 960.207(b). Virtually all El Paso applicants meet a federal preference of being 1) involuntarily displaced, 2) living in substandard housing, or 3) paying more than fifty percent (50%) of family income for rent. 24 C.F.R. § 960.204(a),(b)(4). El Paso,

without dispute, has a sufficient pool of applicants likely to qualify for a federal preference. There is no way an open application process could serve all applicants within a reasonable period of time. In short, the Housing Authority can, and does, close the waiting list. No one may apply for a given period of time, but no federal statute or regulation is violated by this necessary procedure.

It was during these closed periods that petitioners experienced their respective difficulties. The application of the Gomezes allegedly was lost, and, because the waiting list was closed, they were not permitted placement on the list. Similarly, the Velasquezes claim they were erroneously told the list was open for a one bedroom apartment, but upon arriving at the Authority's offices, were told they did not qualify. Because they were a married couple with one child, the Velasquezes should have applied for a two bedroom apartment. The waiting list for two bedroom apartments was closed. Their application allegedly was torn up, and they were told to return when applications were being accepted.

Several factual findings compromised petitioners' claims at trial. The court found that none of the petitioners had filed applications at the time the lawsuit was filed. As to the Gomezes, it was found, at the time their complaint was filed, they did not consider themselves in need of housing and that after their application was lost, no attempt was made to refile an application at the times during which applications were being accepted.

As to the Velasquezes, it was found they had called the Housing Authority once or twice a month during 1990 to inquire about housing. Their testimony was that

on November 12 or 13, 1990, having been told by telephone that housing was available, they went to the Authority and submitted an application. *Id.* at 1365-66. It was during this meeting that the application was said to have been torn up by an employee on the grounds the Velasquezes did not qualify for a one-bedroom apartment. *Id.* at 1366. The court, however, found that on those dates the waiting list for both sizes of apartments was closed. No telephone call should have been made. No application should have been accepted. This factual finding has not been challenged by the Velasquezes, and does not strengthen their testimony concerning the incident in question.

One additional factual matter, referenced above, deserves comment: the trial court's finding that it had "no evidence but that the Velasquezes' application was torn up and the Gomezes' application was lost." *Id.* at 1372. The employee charged with receiving applications testified she had never torn up an application and had never seen anyone else destroy an application. Petitioner Yolanda Gomez testified that this employee "was very nice. She wasn't rude or none of that."

The Housing Authority, in processing a large number of applications, could not, and cannot, categorically deny that its employees have never lost or destroyed an application. The Housing Authority is at a severe disadvantage in trying to disprove the specific claims of the petitioners, especially a claim of deliberate destruction of an application.

Petitioners, however, provided "no evidence, nor did they even contend, that the Authority had a policy or custom of tearing up or losing applications." *Gomez*, 805

F.Supp. at 1372. The destruction of the Velasquezes application was found to be the act of an individual employee. *Id.* The loss of the Gomezes' application was an "inadvertent, at best negligent, occurrence for which no one is to blame." *Id.* These findings are not clearly erroneous. Fed. R. Civ. P. 52(a).

The trial court required a showing that HUD admission regulations either were violated by a policymaker or by Housing Authority policy or custom. No evidence was presented that the governing board or the chief executive officer violated any such regulation. The court examined the admission policies in regard to federal preferences for public housing. Each argument of petitioners was rejected by the court. Other than finding that petitioners had made no application for housing, the court found that even had they been on the waiting list, no policy would have adversely affected them.

The claim that the placement of all persons in a single applicant pool discriminated against persons with a federal preference was held to be without merit. The practice of the Housing Authority was to verify eligibility some 30 to 60 days prior to apartment availability. Many circumstances could change from the date of application until a housing unit became available. During these months or years of waiting, income, family size, and even the need for public housing could change. HUD requires such a reevaluation. 24 C.F.R. § 960.211(c)(3).

Because of the three years average wait, it made little sense to thoroughly screen applicants at the beginning of the procedure. When housing becomes available, the 30 to 60 day period allows the Authority sufficient time to review eligibility. It also must be remembered that almost

all applicants qualified for a federal preference. Petitioners provided no evidence this procedure caused any delay for applicants with a preference.

The trial court ultimately found no evidence was produced that the Housing Authority had a policy or custom of tearing up or losing applications. The court refused to attribute the act of tearing up the Velasquezes' application to the Authority itself. The loss of the Gomezes' application was found to be inadvertent, and at best, negligent.

The court of appeals viewed the behavior of the Housing Authority employees in a harsher light, calling it "negligent or even abusive." Respondents disagree with the latter characterization, especially when a supervisor could have been called immediately by the Velasquezes to address the difficulty, and when the intake employee at trial denied tearing up anyone's application.

Nonetheless, the appellate court held that in no instance did the behavior "rise to the level of a constitutional tort cognizable under § 1983." The per curiam appellate opinion is as brief as the trial court's opinion is detailed. The result, however, is the same: no harm came to the petitioners and no federally protected right was implicated.

REASONS FOR DENYING THE PETITION

The Fifth Circuit held that no constitutional tort was worked upon petitioners. This holding is correct for several reasons, the primary one of which is factual. Applications were not being accepted from anyone when petitioners sought to be placed on the waiting list. No hearing was required to keep an applicant off the list when it was closed. Once those persons on the list were

accommodated, new applications again would be accepted, and the process would start over. This satisfied HUD regulations and federal law.

Both petitioners had logical arguments as to why they should have been placed on the list at a time when all other would-be applicants were denied access. This was especially true as to the Gomezes if their story is accepted. Their application was lost. At the time, however, there was no way to verify that an application had actually been filed. The Gomezes, therefore, were told to reapply when the application process reopened.

The Velasquezes' reasons are not as compelling, but, if their version of the facts is accepted, they were treated much more curtly than were the Gomezes. An unknown employee tore up their application when it was realized they were not eligible for a one bedroom apartment. The Fifth Circuit panel found this offensive, but not to the point of finding that a constitutional claim was stated.

The legal basis for denying the petition for certiorari is grounded equally in municipal liability cases and in procedural due process cases. Under either analysis no valid claim has been stated, and the petition should be denied.

MUNICIPAL LIABILITY

No Housing Authority Policy or Policymaker Authorized, Tolerated or Condoned the Constitutional Infringements Claimed By Petitioners

Petitioners assert a procedural due process claim. The court found that due process infringements, if any, were the acts of subordinates in contravention of established policy that passed constitutional muster. The failure to adhere to constitutional standards was not the

result of a Housing Authority policy or custom. No policymaker ratified the aberrant or negligent actions of any employee.

Liability attaches to a municipality under 42 U.S.C. § 1983 only when the municipality itself causes the constitutional violation. *City of Canton* v. *Harris*, 489 U.S. 378 (1989). *Respondeat superior* or vicarious liability theories cannot impose liability under Section 1983. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978).

Recovery is permitted only "when it can be fairly said that the city itself is the wrongdoer." *Collins* v. *City of Harker Heights*, ___ U.S. ___, 112 S.Ct. 1061, 1067 (1992). The injured party must prove "that the city was at fault for establishing the policy" which inflicted the harm. *City of Springfield* v. *Kibbe*, 480 U.S. 257, 270 (1987) (O'Connor, J. dissenting).

The cases defining municipal liability, summarized above and discussed in more detail below, put beyond dispute the correctness of the trial court's judgment and its subsequent affirmance. Neither the governing body nor the executive director injured the housing applicants. No evidence was presented that "Mr. Carrera [the executive director] or any Board Members of the EPHA [El Paso Housing Authority] violated HUD regulations or ratified the actions of an EPHA official or employee that amount to violations of HUD regulations regarding admissions and Federal preferences." *Gomez*, 805 F.Supp. at 1368-69. No policymaker caused any harm to the Gomezes or Velasquezes.

> The Supreme Court, over thirty years ago, held that:
> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.

Monroe v. *Pape*, 365 U.S. 167, 184 (1961), *quoting United States* v. *Classic*, 313 U.S. 299, 326 (1945) (plurality opinion).

The consequence of this holding was to create a federal civil cause of action and an offensive use of the Fourteenth Amendment to protect constitutional rights. *Developments in the Law-Section 1983*, 90 Harv. L. Rev. 1133, 1173 (1977). This caused the development of federal caselaw for "constitutional torts" independent of state defenses and unconstrained by state law policies. *Howlett* v. *Rose*, 496 U.S. 356 (1990).

Petitioners, at both trial and appeal, did not discuss municipal liability as it has evolved from *Monroe* v. *Pape* through *Collins* v. *City of Harker Heights*. They instead underscored the importance of *Zinermon* v. *Burch*, 494 U.S. 113 (1990), while seeking to avoid the holdings in *Parratt* v. *Taylor*, 451 U.S. 527 (1981) and *Hudson* v. *Palmer*, 468 U.S. 517 3194 (1984). These three cases are addressed later in this brief, but, given the trial court's reliance on *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988), it is appropriate to first review the municipal liability cases and then proceed to the procedural due process cases. This ordering of discussion does not suggest that either the cases or the respective doctrines are at odds, *Wilson* v. *Civil Town of Clayton, Ind.*, 839 F.2d 375, 380 (7th Cir. 1988), and the separate lines of authority are divided for analysis only. Neither do the respondents attempt to reconcile every aspect of the two doctrines. The cases overlap, and often will be cited in each line of authority.

There are two "essential elements" which a plaintiff must prove in order to state a claim under Section 1983:

1. [T]he conduct complained of was committed by a person acting under color of state law, and

2. [T]his conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Parratt v. *Taylor*, 451 U.S. 527, 535 (1981).

The terms "under color of law" and "state action" are coterminous because "Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords." *Lugar* v. *Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982). "[I]f a defendant's conduct satisfies the state action requirement of the Fourteenth Amendment, 'that conduct [is] also action under color of state law and will support a suit under § 1983.' " *West* v. *Adkins*, 487 U.S. 42 (1988).

The second element of a Section 1983 claim, the deprivation of rights secured by the constitution, must be read against "the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe* v. *Pape*, 365 U.S. at 187.

Individual acts, and the accompanying responsibility, take on an added dimension when performed by employees or officers of governmental units. Recognizing that governmental bodies can act only through natural persons, the Supreme Court, in *Monell* v. *Dept. of Social Services*, sought to define the circumstances when governments themselves should be held responsible for the acts of individuals. As Justice Brennan was later to note, the injurious acts must be connected to the governing body, "that is, acts which the municipality has officially sanctioned or ordered." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480 (1986) (plurality opinion). In *Monell* two specific categories of governmental sanction were recognized:

1. The action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision

officially adopted and promulgated by the body's officers. *Monell,* 463 U.S. at 690.

2. The constitutional deprivation was visited pursuant to practices, not authorized by written law, that were so permanent and well settled as to constitute a "custom or usage" with the force of law. *Id.* at 690-691.

In the instant case the evidence strongly supports the finding that no official policy authorized, tolerated or condoned the losses petitioners claim to have suffered. They cannot override the "clearly erroneous" standard of review.

Monell dealt with a written policy that required pregnant employees to be placed on unpaid sick leave even though there was no medical necessity to cease working. An express policy was directed to a specific group of employees and resulted in economic loss. There was no question the policy was official and that it was the "moving force of the constitutional violation." *Monell,* 436 U.S. at 694.

Policies with the clarity of that in *Monell* have been infrequent in most litigation. For example, *Newport* v. *Fact Concerts, Inc.,* 453 U.S. 247 (1981) (vote of city council to cancel license for rock concert) and *Owen* v. *City of Independence,* 445 U.S. 622 (1980) (personnel decision made by city council) present discrete actions of the policymakers. In the absence of such a written policy and a direct result, litigants usually are "confronted with a legal landscape whose contours are 'in a state of evolving definition and uncertainty.' " *City of St. Louis* v. *Praprotnik,* 485 U.S. at 120, quoting *Newport* v. *Fact Concerts, Inc.,* 453 U.S. at 256. In *City of Oklahoma City* v. *Tuttle,* 471 U.S. 808, 820 (1985) the "theory of liability was that the 'policy' in question

was the city's police training and supervising police officers, and that this 'policy' resulted in inadequate training, and the constitutional violations alleged." Inadequate training, according to the plaintiff, resulted in the shooting death of plaintiff's husband by a city police officer.

The Supreme Court was well aware of the "wide difference" between the policy in *Monell* and the policy alleged in *Tuttle*. *Tuttle*, 471 U.S. at 822. The policy in *Monell* "in and of itself violated the constitutional rights of pregnant employees" and "only one application" of such a policy could result in liability. *Id.*

The expanded definition of "policy" urged by the plaintiff in *Tuttle* was "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*." *Id.* Not only did it present causation difficulties, it presented definitional problems with the very word "policy." The word, according to Justice Rehnquist, "generally implies a course of action consciously chosen from among various alternatives." *Id.* at 823. He also expressed doubt as to the existence of a policy of inadequate police training unless it could be shown that "the inadequacies resulted from conscious choice – that is, proof that the policymakers deliberately chose a training program which would prove inadequate." *Id.*

The training program of Oklahoma City police officers was not in itself unconstitutional. *Id.* at 823, n. 7. In such cases "considerably more proof than the single incident will be necessary . . . to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Id.* at 823.

The requirement of a deliberate choice "with respect to the subject matter in question" was restated in *Pembaur* v. *City of Cincinnati*, 475 U.S. at 483-84, as was the continuing recognition that municipal liability is "limited to action for which the municipality is actually responsible." *Id.* at 479-80.

In the case at bar, the trial judge cited *City of St. Louis* v. *Praprotnik*, as the underlying authority to enter judgment against petitioners. Neither the board nor the executive director, Edmund Carrera, engaged in any adverse action:

> In order to find the EPHA liable, Plaintiffs must show by a preponderance of the evidence that there existed a policy or custom by EPHA which violated HUD regulations regarding admissions and federal selection preferences or that Edmund Carrera or one of the Defendant EPHA Board Members was personally involved in such a violation, which would in turn cause EPHA to be liable as Mr. Carrera and the Board Members are policymakers for the EPHA.
> *Gomez*, 805 F.Supp. at 1368, citing *Praprotnik*, 485 U.S. at 123-127.

Praprotnik clarified the constitutional parameters of municipal policy and liability. The plaintiff claimed he had lost his job because of his exercise of First Amendment rights. Justice O'Connor reiterated much of the plurality opinion of *Pembaur:* 1) the acts for which a municipality is responsible must have been officially sanctioned or ordered, 2) only officials with final policymaking authority are subject to governmental liability, 3) the actual officials who possess final policymaking authority is a question of state law, and 4) the challenged action "must have been taken pursuant to a policy adopted by officials responsible for making policy in *that*

area of the city's business." *Praprotnik,* 485 U.S. at 123 (emphasis original).

The exercise of discretion by an employee cannot be confused with conferring policymaking authority:

> If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability.
> *Id.* at 126.

State law allocates policymaking authority among particular individuals and bodies. *Id.* at 928. In Texas, management of housing authorities is placed in the governing board which hires an executive director or other chief executive officer. Tex. Loc. Gov't Code § 392.051. Neither the Housing Authority board nor its executive director violated HUD admissions policies and federal selection preferences. *Gomez,* 805 F.Supp. at 1368. No local policy or custom violated a federally protected right. *Id.*

In *City of Canton* v. *Harris,* 489 U.S. 378 (1989), the issue of the failure to adequately train employees was again addressed. As with the police training policy in *Tuttle,* the Canton, Ohio policy of medically treating arrestees was facially constitutional. The city sought to defend on this ground by arguing Section 1983 liability attaches only where the policy is itself unconstitutional. This was rejected, and the Court concluded "that there are limited circumstances in which an allegation of 'failure to train' can be the basis for liability under § 1983." *Id.* at 387. See also, *Languirand* v. *Hayden,* 717 F.2d 220, 227-228 (5th Cir. 1983).

The imposition of liability, however, requires a high degree of fault. In "failure to train" cases liability would be permitted only when the failure "amounts to deliberate indifference to the rights of persons with whom the

police came into contact." *Canton*, 489 U.S. at 388. The basis for liability in such cases may be traced to the "deliberate choice to follow a course of action," mentioned in *Pembaur*, 475 U.S. at 483-484, and the "conscious choice" referred to in *Tuttle*, 471 U.S. at 823. The Housing Authority exhibited no deliberate indifference to any applicant for public housing.

In comparing deliberate indifference to gross negligence the majority opinion in *Canton* referred to these two standards as causing a "substantial division" among the lower courts. The court then opted for the higher standard. Gross negligence is not enough to impose Section 1983 liability on municipalities. *Canton*, 489 U.S. at 388, n. 7. The concurrence also emphasized the "high degree of fault before an omission that is not in itself unconstitutional can support liability as municipal policy under *Monell*." *Id.* at 396 (O'Connor, J. concurring). Not even ordinary negligence can be attributed to the policymakers at the Housing Authority.

Negligence alone, in any constitutional claim, is not enough to establish governmental liability. *Daniels* v. *Williams*, 474 U.S. 327 (1986) held:

> [I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right, merely negligent conduct may not be enough to state a claim.

Under *Canton* the standard is even higher than gross negligence. In the case at bar neither form of negligence can be imputed to the policymakers.

Interpreting the causation requirement of § 1983 as the equivalent of the standard of care requirement first enumerated in *Monroe* v. *Pape*, the Supreme Court again unequivocally concluded that "negligence . . . alone is not sufficient to satisfy the causation requirement of Section

1983." *City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987). Negligence is not the standard of care in these types of Section 1983 cases and will not implicate Fourteenth Amendment protections.

The housing applicants herein can establish no affirmative link between the policymaking officials and the claimed injuries. The question of causation "is a difficult one; one that has left this Court deeply divided in a series of cases that have followed *Monell*." *Canton*, 489 U.S. at 385-86. The official policy, still must be "affirmatively linked," *Tuttle*, 471 U.S. at 823, to the injury, or constitute the "moving force," *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981), behind the violation.

Causation cannot be examined without reference to the appropriate standard of care, or as Justice White stated "the degree of fault." *Canton*, 489 U.S. at 388. From the conscious choice" from among various alternatives of *Tuttle*, 471 U.S. at 823, to the "deliberate indifference" of *Canton*, 489 U.S. at 388, a plaintiff must prove by substantial evidence the culpability of the policymaker. No such proof was offered in the case at hand. Neither the board of commissioners nor the executive director were deliberately indifferent to the constitutional rights of persons applying for low cost public housing.

PROCEDURAL DUE PROCESS

No Procedural Due Process Deprivation Occurred In That (1) The Loss Or Destruction Of Housing Applications Is Unpredictable And Unforeseeable, (2) Predeprivation Procedures Would Be Impotent To Counter Such Conduct, (3) The Conduct Is Not Within The Authority Of The Offending Housing Authority Employees, And (4) Adequate Remedies Exist To Correct Any Deprivation

The petitioners largely ignore the cases dealing with municipal liability, mentioning *Praprotnik* only to argue its inapplicability. They instead turn to *Zinermon* v. *Burch*, 494 U.S. 113 (1990), a case that has led one jurist to write that the decision "undoubtedly complicated an already overloaded procedural due process jurisprudence." *Caine* v. *Hardy*, 905 F.2d 858, 863 (5th Cir. 1990) (Jones, J., dissenting) *opinion superseded by Caine* v. *Hardy*, 943 F.2d 1406 (5th Cir. 1991) (*en banc*).

Another judge, writing in regard to a proposed interpretation of *Zinermon*, stated that if the reading were correct then "a line of precedent already resembling the path of a drunken sailor may [be taking] a new turn." *Easter House* v. *Felder*, 910 F.2d 1387, 1409 (7th Cir. 1990) (Easterbrook, J., concurring). In general, the application of *Zinermon* is not an easy task even though the facts in the case at hand make the task less difficult, no matter how circuitous the route. The destination, however, may be described with clarity: *Zinermon* is not applicable.

The discussion of *Zinermon* requires reference to *Parratt* v. *Taylor*, 451 U.S. 527 (1981) and *Hudson* v. *Palmer*, 468 U.S. 517 (1984). *Parratt* held that unauthorized and random acts of negligence by public employees do not give rise to procedural due process claims if the state provides

adequate post deprivation remedies. *Parratt* was partially overruled by *Daniels* v. *Williams*, 474 U.S. 327 (1986) that held, as discussed previously, that mere negligence cannot support a due process claim.

Parratt dealt with the negligent loss of a prison inmate's mail-order hobby materials, valued at $23.50. The Supreme Court held that a random and unauthorized act, negligent at best, would not constitute a violation of the Fourteenth Amendment.

Hudson extended the *Parratt* holding to the intentional destruction of a prisoner's property during a cell search. One of the guards conducting a routine "shakedown" search allegedly destroyed noncontraband possessions of the prisoner. The wrongful act of the guard, assumed to be true for summary judgment purposes, was found to be random and unauthorized, an act "[t]he state can no more anticipate and control in advance . . . than it can anticipate similar negligent conduct." *Hudson*, 468 U.S. at 533.

Post deprivation remedies under state law existed: a common law state court action and/or a prison grievance procedure. *Id.* at 530 and 534-35. The "controlling inquiry" was whether the state could provide a predeprivation process." *Id.* at 534.

Due process considerations, of course, are applicable only if life, liberty or property are implicated. Respondents do not concede that a housing application, even if lost or destroyed, is a property interest.

While an application is the first step in obtaining admission to housing, an application, especially in the context of petitioners' appellate claims, is difficult to define as property. In and of itself it cannot be raised to constitutional dimensions. Even if an application may be

defined as property it does not require full procedural due process.

Since *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) the definition of property has centered on entitlement:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Certainly the mere filing of an application cannot be said to create a legitimate expectancy of admission to public housing. No claim of entitlement exists at this point; no benefit has yet attached.

Unlike the welfare recipients in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) or the students in *Goss* v. *Lopez*, 419 U.S. 565 (1975), public housing applicants have not yet received a benefit at the time of application. Unlike the plaintiffs in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), the petitioners herein were not already tenants.

In reference to another section of the Housing Act, the Ninth and Seventh Circuits have dealt with claims asserting due process rights to Section 8 subsidized housing. 42 U.S.C. § 1437f. In *Ressler* v. *Pierce*, 692 F.2d 1212, 1214 (9th Cir. 1982) the court found applicants for Section 8 benefits were entitled to due process protection. The contrary was held by the Seventh Circuit in *Eidson* v. *Pierce*, 745 F.2d 453 (7th Cir. 1984).

The Seventh Circuit examined whether there was a "legitimate claim of entitlement" to the Section 8 benefits. Using *Board of Regents* v. *Roth* as a guide the court found that persons on waiting lists had no constitutionally protected property interest.

The creation of a property interest in a federal loan application was rejected in *Shaner* v. *U.S.*, 976 F.2d 990 (6th Cir. 1992). The claim of a property right in an FmHA emergency loan, for which application had been made, was found to be too speculative to be considered property. *Id.* at 995. Similarly, in *Nelson* v. *U.S.*, 16 Ct. Cl. 510 (1989), the court held no property right existed until the loan was approved and a contractual right resulted. In *Ashbrook* v. *Block*, 917 F.2d 918, 924 (6th Cir. 1990) it was held that no property right exists to additional FmHA funding.

The trial court, however, held that petitioners as housing applicants, could sue to enforce federal admissions requirements. Citing *Henry Horner Mothers Guild* v. *Chicago Housing Authority*, 780 F.Supp. 511, 516 (N.D. Ill. 1991), the court found suit could be brought by applicants and "those persons who have attempted, but been unable, to get on the waiting list because of alleged violations of HUD regulations . . . " *Gomez*, 805 F.Supp. at 1368.

While respondents herein do not embrace this legal conclusion in the present fact situation, they have not directly contested it on appeal. No issue has been raised because the court correctly applied *Praprotnik*, and required a showing of a policy or custom which violated HUD regulations.

If it is assumed a property interest is involved, the most obvious postdeprivation remedy in the case at hand

would have been to have complained to a supervisor. Failing resolution at that level, the Gomezes and Velasquezes could have brought their respective complaints to the attention of the executive director and/or the board of commissioners. Board meetings are open to the public. Tex. Gov't Code § 551.001. All Texas residents may petition local governmental subdivisions. *Professional Association of College Educators* v. *El Paso County Community College District*, 678 S.W.2d 94, 95 (Tex. App. – El Paso 1984, writ ref'd n.r.e.).

Common law damages or equitable relief could have been sought in the appropriate state forum, although the most expeditious relief could have come from upper management or the board itself.

These potential remedies for the loss or destruction of an application should not be confused with other review rights. Prior to executing a lease the Housing Authority must require an applicant claiming a federal preference to verify same. 24 C.F.R. § 960.211(c)(3). If the preference is denied, the applicant is given the right to review the denial with a Housing Authority designee. 24 C.F.R. § 960.211(k).

Petitioners claim this right of review must be given at the time the initial application is made. This is not what the regulations require, and the absence of such a premature and needless procedure harms no one.

Zinermon, 494 U.S. at 132, recognized the inability in certain circumstances of the state "to provide predeprivation process because of the random and unpredictable nature of the deprivation." *Zinermon*, however, involved a state procedure involving the risk of confinement in a state mental institution. The risk of a liberty deprivation

was heightened because the potential patients were permitted to voluntarily commit themselves to the institution.

Darrell Burch "voluntarily" committed himself to a state mental health treatment facility. Upon his release after five months confinement, Burch claimed that a hearing should have been conducted prior to his confinement, and that to confine him without such a hearing, violated his due process rights.

The *Parratt/Hudson* doctrine was offered, and rejected, as a defense to Burch's claims. According to the *Zinermon* majority, a predeprivation procedure could have been implemented much like the involuntary commitment procedure the state had already in place. Moreover, the statutory scheme authorizing commitment required informed consent by a competent person, but there was no method to ascertain competency. It was, in the words of Justice Blackmun, "hardly unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent, and that state officials with the power to admit patients might take their apparently willingness to be admitted at face value and not initiate involuntary placement procedures." *Id.* at 136.

In *Parratt* the very nature of the deprivation made a predeprivation hearing an act "border[ing] on the absurd." *Id.* at 989, quoting *Daniels* v. *Williams, supra,* 474 U.S. at 342, n. 19. In *Hudson* it would have been equally "absurd to suggest that the State hold a hearing to determine whether a guard" could maliciously destroy a prisoner's property. *Zinermon,* 494 U.S. at 137.

The *Zinermon* court could not characterize the conduct of the defendant hospital employees as "unauthorized" as the term was defined in *Parratt/Hudson. Id.* at 138. The prison

officials in *Parratt/Hudson* "had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate (for persons unable to protect their own interests) the procedural safeguards required before deprivations occur." *Id.* Predeprivation safeguards would have been of use in *Zinermon*, but would have been futile in *Parratt/Hudson*.

The majority opinion in *Zinermon*, 494 U.S. at 124-128, begins its legal analysis with *Monroe* v. *Pape*, 365 U.S. 167 (1961), and proceeds to review the test in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Predeprivation hearings are said to be the norm, with the *Parratt/Hudson* doctrine being an exception. In such a special circumstance "postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the state could be expected to provide." *Zinermon*, 494 U.S. at 128. This, however, does not mean *Parratt/Hudson* has been abandoned. As will be discussed, *Parratt/Hudson* is itself a result of *Mathews* balancing.

The Fifth Circuit Court of Appeals, in applying the *Zinermon* decision, has found "three preconditions for the application of the *Parratt/Hudson* doctrine: the deprivation must truly have been unpredictable or unforeseeable; the predeprivation procedures must have been impotent

to counter the state actors' particular conduct; and the conduct must have been 'unauthorized' in the sense that it was not in the officials' express or implied authority." *Caine* v. *Hardy*, 943 F.2d 1406, 1413 (5th Cir. 1991) (*en banc*).

Zinermon, however, did not alter the balancing of the personal and state interests described in *Mathews* v. *Eldridge*. *Caine*, 943 F.2d at 1413. The *Zinermon* majority, according to *Caine*, "characterizes its analysis as an application of the *Parratt/Hudson* doctrine which in turn implemented *Mathews* balancing." *Id*. This is demonstrable when the facts of the instant case are measured against the *Mathews* factors.

The first factor of defining the private interest that will be affected by the official action is apparent: the right to apply for public housing. The second involves the risk of erroneous deprivation through present procedures and the value, if any, of added procedures. Current procedures do not call for losing or destroying applications. It is stressed petitioners are complaining about a procedure that does not grant a predeprivation hearing before losing or destroying applications. The review process employed after a preference is denied is not challenged. Petitioners wish to implement the review at the time of the intake interview, not at the time an apartment becomes available as presently allowed. 24 C.F.R. §§ 960.207(a); 960.211(k); EPHA Statement of Policy.

No one is authorized to destroy or lose applications. The employee charged with receiving applications testified she had never destroyed an application nor had she seen any other employee do so. Intake personnel and the eligibility officer were not acting under "a standardless grant of authority," *Bigford* v. *Taylor*, 834 F.2d 1213, 1222

(5th Cir. 1988), but under a policy which called for the receipt of applications, followed by the evaluation of eligibility at a later time. An added procedure would be as pointless as a new regulation requiring a hearing before losing or destroying prisoners' property.

The final *Mathews* factor speaks to the government's interest and the burden an additional or substitute procedure would entail. This factor, given the facts at hand, is closely related to the second factor. Such a procedure could not be made to work and would interfere with the governmental interest to provide housing to qualified applicants. The diversion of resources to a pointless procedure would serve no interest of the government or persons in need of public housing.

The application of the *Mathews* balancing test leads not to *Zinermon*, but to *Parratt/Hudson*. Indeed, the balancing of the *Mathews* factors is tantamount to an application of *Parratt/Hudson*. It cannot be predicted when an employee might engage in an unauthorized or negligent act. The Housing Authority " 'cannot be required constitutionally to do the impossible by providing predeprivation process' to stem aberrant, unpredictable conduct." *Caine*, 943 F.Supp. at 1412, quoting *Zinermon*, 110 S.Ct. at 985.

Finally, it was found at trial that no adverse action by an employee was taken pursuant to established procedure. All acts alleged to have harmed the housing applicants were random. The Gomezes had their application lost while the Velasquezes were erroneously told to come in at a time when applications were not being accepted. The Velasquezes application then was torn up. As to the Velasquezes, the trial court found the application period had expired, and even if the period had been

impermissibly extended it would have not benefited them.

Petitioners, even if damaged, were not injured by an official regulatory or procedural scheme that resulted in the destruction of a property interest. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), is not applicable. In the context of a procedural due process claim, *Parratt/Hudson* does apply, and the judgments of the trial court and court of appeals may be affirmed on this alternate ground.

CONCLUSION

Municipal liability may be imposed only when an injury is caused by a policymaker or inflicted under a policy or custom. No injury was established in the instant cause; no policy or custom permitted negligent or aberrant behavior; and no policymaker acted in a negligent or aberrant fashion.

The isolated acts of losing or destroying a housing application, even if an application is a specie of property, cannot form the basis of a procedural due process claim. A hearing to permit the impermissible is as illogical as it is bizarre. No procedure can sanction human oversight or petty behavior.

The Housing Authority's overall application process, from its maintenance of a waiting list, to its review procedures for federal preferences, satisfies federal law and

regulation. For these and the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

EDWARD W. DUNBAR
Counsel of Record

MICHAEL C. CROWLEY
CHRISTIE, BERRY & DUNBAR
1700 North Stanton
El Paso, Texas 79902
915/532-3638

Counsel for Respondents